The Public Commission to Examine the Maritime Incident of 31 May 2010

The Turkel Commission

Report | Part one

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January 2010

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Incident of 31 May 2010

Mr. Benjamin Netanyahu

The Prime Minister

The honorable Prime Minister,

Re: <u>Report of the Commission for Examining the Maritime Incident of May 31, 2010 - Part One</u>

Pursuant to paragraph 10 of Government resolution no. 1796 of June 14, 2010, we respectfully submit to the Government a report on the following matters:

a. The security circumstances in which the naval blockade on the Gaza Strip was imposed and whether the blockade complies with the rules of international law (paragraph 4a of the Government resolution).
b. Whether the actions carried out by Israel to enforce the naval blockade on May 31, 2010, complied with the rules of international law (paragraph 4b of the Government resolution).
c. The actions carried out by the organizers and participants of the flotilla and their identities (paragraph 4c of the Government resolution).

In the next stage, the commission will submit part two of the report, which will address the question whether the mechanism for examining and investigating complaints and claims of violations of the laws of war, as carried out by Israel in general, and as implemented with regard to the events of May 31, 2010, in particular, complies with the obligations of the State of Israel pursuant to the rules of international law. Part two of the report will also address other questions that arose from the material before the commission.

Justice Emeritus Jacob Türkel
Chairman of the commission

Ambassador Reuven Merhav
Member of the commission

Major-General (res.) Amos Horev
Member of the commission

Prof. Miguel Deutch
Member of the commission

Lord David Trimble
Observer

Brigadier-General (ret.) Kenneth Watkin
Observer

Commission Members
Justice (Ret.) Jacob Turkel, Chairman
Ambassador Professor Shabtai Rosenne, (Deceased 21.9.10)
General (Ret.) Amos Horev
Ambassador Reuven Merhav
Professor Miguel Deutch

Foreign Observers
Lord David Trimble (United Kingdom)
Brigadier General (Ret.) Kenneth Watkin, Q.C. (Canada)

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Mrs. Tali Mehaber
Mrs. Toni Foigelman
Mr. Aviad Feigin

Table of Contents

Observers' Letter 11

Preface to the Report 13

Introduction 15

The background to the establishment of the Commission and the Government resdutions 15

Deliberations of the Commission 19

The structure of the report 24

Chapter A: The naval blockade of the Gaza Strip 25

General background to the imposition of the naval blockade on the Gaza Strip 26

The status of the Gaza Strip in the years 1967-2010 26

The territorial waters of the Gaza Strip in the years 1967-2010 32

The Questions before the Commission 38

The Conformity of the Naval Blockade with International Law 38

The legal framework 38

The concept of a 'naval blockade' in general 38

The legal sources 40

The legal definition of the term 'naval blockade' and the rules governing its imposition and enforcement 44

The conflict in the Gaza Strip 45

The classification of the conflict between Israel and the Hamas and the implications of this classification for the naval blockade 45

Is the Gaza Strip an occupied territory? 50

Israel's imposition of the naval blockade 53

The purpose of the naval blockade 53

Alternatives to the naval blockade 58

Israel's Compliance with the Legal Rules Governing a Naval Blockade 61

Commitment to the rules of international law 61

'Notice' of the imposition and duration of a naval blockade 62

Humanitarian obligations 64

The humanitarian situation in the Gaza Strip 69

Claims regarding the humanitarian situation in the Gaza Strip 72

The prohibition of starving the civilian population 82

The provision of objects essential for the survival of the civilian population 84

Passage of medical supplies 86

The military advantage of the naval blockade versus harm caused to the civilian population 90

'International human rights law' and its application in our case 102

Claims regarding 'collective punishment' 104

Means of resolving disputes regarding the legality of a naval blockade 109

Chapter A: Conclusions 111

Chapter B: The actions undertaken by Israel to enforce the naval blockade on May 31, 2010 113

General 113

The facts 116

The preparation stage 116

The situation before the operation from an intelligence perspective 116

Decision of the political echelon 119

The diplomatic attempts to prevent the flotilla from departing 121

The IDF's preparations for the 'Winds of Heaven 7' operation 124

The military operation for enforcing the naval blockade on May 31, 2010 - the implementation stage 138

The Inquiry and Warning Stage 138

Giving the instruction to take over the ships 141

The Takeover of the Mavi Marmara 142

The Takeover of the Other Vessels 180

Treatment of the Flotilla Participants from their Arrival in the Ashdod Port until their Deportation from Israel 184

The Deceased and the Wounded 190

Post-incident Events 193

The Flotilla Participants and Their Activities: Additional Details 197

The Organizers of the Flotilla 197

The Participants on the Flotilla 205

The Identity and Organizational Affiliation of the Dead and the Wounded 216

The Questions before the Commission 219

Conformity between the Actions Israel Took to Enforce the Blockade on May 31, 2010, and International Law 219

The Law Governing the Enforcement of the Blockade 219

Enforcement in International Waters 220

The Capture of the Flotilla Vessels 221

Law Applicable to the Use of Force against Persons on Board the Flotilla Vessels 228

Application of International Humanitarian Law or Human Rights Law 228

The Status of the Civilian Passengers 233

Status of the IHH Activists 234

Status of the Captain and Crew 241

The Rules of Engagement and the Use of Force....242

General Assessment Regarding the Use of Force during the Enforcement of the Blockade....247

The nature of the threat posed to the IDF....247

The Nature of the Response by the IDF....256

Analysis of the Use of Force by IDF Soldiers during the Takeover Operations on May 31, 2010....263

Impact of the Planning and Organization of the Operation on the Use of Force....270

An AHernative Perspective: Analysis of the Opening Actions Under Law Enforcment Norms....275

Chapter B: Conclusions....278

Concluding Remarks....280

Annexes....281

The Rt. Hon. (William) David Trimble, Lord Trimble

Brigadier-General (Ret.) Kenneth Watkin, Q.C.

It is an honour for us to serve as Observers to the Public Commission appointed to inquire into the maritime incident of 31 May 2010. We understood and accepted the sensitivities that led to our appointment as observers to the Commission and not, strictly speaking, members of it. Nonetheless we are satisfied that we had access to all the material before the Commission and we were fully involved by the Commission in all its work.

All testimonies, both in open and private session and all formal meetings of the Commission were, of course, conducted in Hebrew. However they were simultaneously translated for us into English. In the early days there were some difficulties with the translation of documents into English; these were quickly overcome as our work proceeded.

We are glad that the Commission made repeated efforts to hear both sides, extending to making arrangement for evidence to be given by video conferencing and offering to take evidence in a neutral location. We regret that these offers were not taken up. But we would like to express our appreciation of the Israeli Arabs, who were on the Mavi Marmara and who gave evidence to us. We would also like to thank the representatives of the Israeli Human Rights Non-Governmental Organizations who testified and provided significant material to the Commission.

The Commission made enormous efforts, to get as much information as possible. This involved going back to the IDF for additional information, obtaining further staff to examine all the video material (hundreds of hours) including the CCTV downloaded from the Mavi Marmara and to collate the material so that it has been able to examine each use of force by the IDF. We have also been impressed with the efforts of the small but very dedicated team of lawyers supporting the work of the Commission.

We have no doubt that the Commission is independent. This part of the report is evidence of its rigour.

On a personal note we want to thank all the members of the Commission who each have gone out of their way to welcome and assist us. It is a pleasure to work with them. Special mention must be made of the chairman, Judge Turkel, for his consideration of us personally and the clarity with which he directed the work of the commission.

We would also like to extend our sincere appreciation to the tireless efforts of Commission Coordinator, Hoshea Gottlieb, who has been instrumental in ensuring our successful participation in this Commission.

We would also like to place on record our enormous regard for those who have assisted us as Observers from outside of Israel including the staff who provided the simultaneous translations of all the oral proceedings, punctuated only by reminders to us to speak into the microphones; the translators who ensured voluminous texts were available to us in English; and the ever helpful and diligent administrative staff who have looked after our every logistical need.

Finally we regret that our acquaintance with Shabtai Rosenne was cut short by his death. He impressed us with his knowledge, experience, insight and, above all, with his character and courtesy. He was a true gentleman.

Lord David Trimble

Kenneth Watkin
Brigadier-General (Ret.)

Preface to the Report

When the commission was established, we took upon ourselves, jointly and as individuals, the difficult and agonizing task of ascertaining the truth regarding the issues that we were asked to address. The commission was given complete independence, and each of its members has a record of many years of independent and objective service in various capacities: a Supreme Court justice, one of the most senior judges in Israel, as chairman of the commission; a professor, scholar, diplomat and researcher of international reputation in the field of international law, who sadly passed away during the Commission's work on September 21, 2010; a former president of the Technion - Israel Institute of Technology, a major-general in the IDF and the chairman of the board of directors of Rafael, with rich experience, including on public commissions of inquiry; an expert in Middle-East studies, a senior member of the intelligence and security establishment, a diplomat experienced in international relations, an ambassador and former director-general of the Ministry of Foreign Affairs; a professor, teacher, scholar, researcher and author of repute in the field of civil law. Two observers sat with us, as members of the commission in every respect: Lord David Trimble from Ireland, a Nobel peace prize winner and formerly the First Minister of the Northern Ireland Assembly, and Brigadier-General (res.) Kenneth Watkin from Canada, formerly the Judge Advocate-General of the Canadian Forces.

Initially we thought that the investigation of the circumstances in which the naval blockade was imposed on the Gaza Strip and enforced and the legality of these actions would not require the consideration of difficult factual and legal questions. But it soon became clear to us that the investigation would be lengthy and complex, and require a detailed study both of fact and law. We therefore asked the Government to extend the powers of the commission and to increase the number of its members (from three, at the time of the original appointment, to five), in order to enable it to carry out its duties in an optimal manner. The Government agreed to this request.

As an example of the need that arose for wider and more comprehensive investigations, it should be said here that at quite an early stage we realized that we could not examine the naval blockade without also examining the land crossings policy for the transfer of humanitarian supplies to the Gaza Strip and even the humanitarian situation in the Gaza Strip in general. Admittedly, the question of the land crossings policy and the humanitarian situation in the Gaza Strip would appear, *prima facie*, to go beyond the scope of the naval blockade - whose purpose was to prevent the passage of weapons to the Gaza Strip by sea, a route that

has never been used to convey humanitarian supplies - but the mistaken impression formed in certain circles with regard to the purposes of the blockade compelled us to consider this issue as well, and to widen our investigation far more than we had originally thought.

Another example of a question that required far more extensive and thorough consideration was the question of the circumstances and legality of the takeover of the *Mavi Marmara* and the other flotilla vessels by IDF forces. In this regard we felt ourselves duty-bound to examine the precise details of all the acts and operations carried out by each individual member of the armed forces and the security personnel that boarded the *Mavi Marmara* and the other flotilla vessels, minute by minute, and we examined the legality of the acts with great care from every proper perspective.

In investigating these and other issues in all their aspects, we have been as precise as possible and done everything that flesh and blood can do when called upon to pass judgment in such a matter. We have devoted ourselves to our work and aspired to arrive at the exact truth, even if it is hard and painful. Along this route, we have hoped that we should not stumble or err either in a matter of fact or of law. We hope that we have succeeded in achieving this.

Here we would like to express our gratitude and deep appreciation to the observers who sat with us, Lord Trimble and Brigadier-General Watkin, for their substantial and important contribution to the commission's work and for the considerable trouble that they took; to the external consultants of international reputation, Prof. Dr. Wolff Heintschel von Heinegg and Prof. Michael Schmitt, who agreed with the legal conclusions of the report; reviewed and commented on the Commission's legal analysis; and agreed with the legal conclusions, for their very valuable help; to Prof. Ruth Lapidoth, recipient of the Israel Prize for international law, for her advice and very important guidance. Special thanks are given to the excellent team of jurists and the administrative staff who assisted us tirelessly, and especially to Advocate Hoshea Gottlieb, the Commission Coordinator. Without his considerable and important legal and administrative assistance, this report could not have been published.

Introduction

The background to the establishment of the Commission and the Government decisions

1. Since the beginning of 2001, thousands of mortars and rockets of various kinds have been fired in ever growing numbers from the Gaza Strip at towns in the South of Israel near the Gaza Strip, various IDF military bases, the border crossings between Israel and the Gaza Strip (and before the disengagement from the Gaza Strip, also at Israeli towns in the Gaza Strip).[1] After the Hamas terrorist organization seized control of the Gaza Strip in June 2007, the Government adopted various measures. Later, on January 3, 2009, a naval blockade was also imposed on the Gaza Strip.[2]

2. Following information regarding the organization of flotillas whose stated destination was the Gaza Strip (and which therefore sought to breach the naval blockade), the State of Israel took various diplomatic and other measures, both openly and covertly, to prevent the departure of these flotillas by peaceful means. Several ships that tried to reach the Gaza Strip did indeed turn back; others were intercepted by the Israeli navy without the use of force and brought to a port in Israel, and the humanitarian supplies on board were transported to the Gaza Strip via the land crossings.

3 In the days preceding May 31, 2010, a flotilla of six vessels[3] advanced towards the coastline of Israel, with approximately 700 persons on board.[4] The largest of the ships in the flotilla, the *Mavi Marmara*, with

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1 See "The Public Commission to Examine the Maritime Incident of May 31, 2010" (position paper by the IDF Military Advocate General, July 2010), marked by the Commission as exhibit 10 [hereinafter *MAG position paper*]; "threat of rockets from Gaza Strip 2000-2007" (report by The Intelligence and Terrorism Information Center, The Intelligence Legacy Center (IICC) chaired by Reuven Ehrlich, December 2007), terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/pdf/rocket_threat.pdf.

2 See declaration by Minister of Defense "Resolution of Naval Blockade" (Jan. 3, 2009).

3 This report uses the definitions of the Ministry of Transportation (Shipping and Ports Authority), which defines a 'boat' as a vessel which is not a ship and its full length is above 7 meters; and a 'ship' as a vessel whose capacity (gross) is above 100 tons, its length is above 24 meters and is licensed to transport more than 12 passengers out of the Israeli coasts. In this flotilla, there were two boats (Boat SFENDONH 8000, CHALLENGER) and four ships (Mavi Marmara, GAZZE, SOFIA, DEFNE Y). See the definitions chapter of the Seamanship (Sailors) regulations, 5762-2002.

4 See Ministry of the Interior data as submitted to the Commission on Jan. 9, 2011, found in folder marked by the Commission as exhibit 147. According to the Immigration Authority 690 foreign citizens participated in the cruise, along with five Israeli citizens and two

approximately 29 crew members and 561 passengers,[5] constituted the scene of the incident that is described below. The State of Israel also adopted various measures with regard to this flotilla before it departed, but these efforts were unsuccessful. Offers to allow the supplies for the Gaza Strip to enter via Ashdod port or El-Arish port and thereafter via the land crossings were not accepted.

On May 31, 2010, in the early hours of the morning, IDF forces boarded the *Mavi Marmara* and took control of the vessel. During the boarding and taking control of the ship, the IDF forces encountered violent resistance. When the conflict ended, it was found that nine of the ship's passengers had been shot dead, and fifty-five passengers and nine IDF soldiers were wounded.

4 On June 14, 2010, the Government of Israel decided to establish an independent public Commission to examine various aspects of the actions taken by the State of Israel to prevent the ships from reaching the Gaza Strip coast on May 31, 2010 (hereafter: **the Government resolution of June 14, 2010**).[6] Supreme Court Justice Emeritus Jacob Türkel was appointed to chair the Commission, and the late Professor Shabtai Rosenne and General (res.) Amos Horev were appointed as members. Two foreign experts were also appointed to act as observers (hereafter: **the observers**): Lord David Trimble and Brigadier-General (ret.) Kenneth Watkin.

The Commission was asked to examine the following issues:

Palestinians.

5 It should be noted that the data transferred to the Commission on this matter is not unambiguous. This data which will serve us later on, is based on the radio recording of the Marmara captain's answer to the navy's question regarding the number of passengers on the ship; audio file "gc_12_156.550_30_05_2010_22_23_28_19_1.WAV" (minute 02:00 and onwards) from folder 633, in the Navy folder on a data hard disc, marked by the Commission as exhibit 133, transferred to the Commission on 16.09.2010 [hereafter: *Navy data disc*]. This data corresponds with a list by AMAN. At the same time, various sources at IDF and Israeli Police have transferred different data to the Commission on this matter. Thus for example, various IDF sources estimated that there were a larger number of passengers on the Marmara's deck. The ship's log, transferred to the Commission by Israeli Police, stipulates a different number - 601 - including 44 crew members and 557 passengers. The list is detailed and also includes the nationalities of the passengers. At the same time, it cannot be known whether this list was actually updated or whether it is a list containing the names of the passengers who signed up for the cruise. The Ministry of the Interior stated that at the end of the day 535 passengers disembarked from the Marmara at Ashdod's port (since some of the passengers wounded in the course of events were evacuated by air and the nine killed were evacuated by sea).

6 Resolution 1796 of the 32nd Government "appointment of a independent public Commission, chaired by the supreme court judge (ret.), Jacob Turkel, to examine the maritime incident of May 31, 2010" (Jun. 14, 2010) [hereinafter *Government Resolution of 14.6.2010*].

a. An examination of the security circumstances for imposing a naval blockade on the Gaza Strip and whether the naval blockade complies with the rules of international law.
b. Whether the acts carried out by Israel to enforce the naval blockade on May 31, 2010, complied with the rules of international law.
c. An examination of the acts carried out by the organizers and participants of the flotilla, and their identities.'[7]

The Commission was also asked to examine 'the question whether the examination and investigation process for complaints and allegations raised with regard to violations of the law of combat, as generally practiced in Israel and as implemented with regard to the incident under consideration, is consistent with the obligations of the State of Israel pursuant to the rules of international law.'[8]

The resolution also provided that the observers would participate in the deliberations and consultations of the Commission, but 'would not have a right to vote with regard to the Commission's proceedings and conclusions.'[9] At the outset, it should be noted that the two foreign observers were full participants in the Commission's work, as if they were actual members, including the hearing of the testimonies, the internal consultations and the preparation of this report. The observers gave of their time and efforts in order to ensure the work was of the highest standard, while critically examining the procedures that were followed and seeking to arrive at the truth, and they thereby made a very significant contribution to the Commission's work.

Advocate Hoshea Gottlieb was appointed as the Commission's Coordinator.

5 On July 4, 2010, the government decided to extend the Commission's powers and to give it certain powers pursuant to the Commissions of Inquiry Law, 5729-1968:

> 'The Minister of Justice shall determine that the Commission will be given powers pursuant to sections 9 to 11 and 27(b) of the Commissions of Inquiry Law, 5729-1968, subject to the restrictions stated in paragraph 6(c) of the aforesaid Government resolution no. 1796 [the Government resolution of June 14, 2010].'[10]

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7 *Government Resolution of 14.6.2010, supra* note 6, at art. 4.
8 *Government Resolution of 14.6.2010, supra* note 6, at art. 5.
9 *Government Resolution of 14.6.2010, supra* note 6, at art. 3.
10 Resolution 1895 of the 32nd Government "granting authority to the public Commission for the examination of the maritime incident of May 31, 2010" (Jul. 4, 2010) [hereinafter *Government Resolution of 4.7.2010*].

On July 5, 2010, the Minister of Justice decided accordingly.[11]

On July 25, 2010, the Government decided to expand the Commission's panel by adding two more members, Ambassador Reuven Merhav and Professor Miguel Deutch.[12]

On September 21, 2010, the late Professor Shabtai Rosenne passed away. The government subsequently resolved on October 11, 2010, not to appoint a replacement. The chairman of the Commission was given a 'casting vote in any case of a tied vote by the members of the Commission.'[13]

6 At the time of writing this report, two consultants that are prominent experts in the field of international law advised the Commission; Professor Dr. Wolff Heintschel von Heinegg[14] and Professor Michael Schmitt,[15] who agreed with the legal conclusions of the report. Professor Ruth Lapidot, who received the Israel Prize for international law, also contributed significantly to the preparation of the report, and the Commission extends its thanks to her.

7 The team that assisted in the Commission's work included Christine Bjork, Adv. Haim Wismontsky, Adv. and Moran Yahav, Adv.

For the sake of completeness, it should be mentioned that after the Commission was established, a petition was filed in the Supreme Court

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11 See Justice Minister's Resolution "determination regarding the granting of authority to the public Commission for the examination of the maritime incident of May 31, 2010" (Jul. 5, 2010) [hereinafter *Justice Minister Resolution of 5.7.2010*].

12 Resolution 2134 by the 32nd Government "appointing additional members to participate in the public Commission chaired by the supreme court judge (ret.), Jacob Turkel, to examine the maritime incident of May 31, 2010" (Jul. 25, 2010) [hereinafter *Government Resolution of 25.7.2010*].

13 Resolution 2297 by the 32nd Government "the public Commission to examine the maritime incident of May 31, 2010 chaired by judge (ret.), Jacob Turkel - following the death of Prof. Shabtai Rosenne" (Oct. 4, 2010) [hereinafter *Government Resolution of 4.10.2010*].

14 Prof. Dr. Wolff Heintschel von Heinegg is the Vice-President of the Europa-Universität Viadrina in Frankfurt (Oder), Germany, where he is Professor of Public International Law, European Law and Comparative Constitutional Law. He previously served as dean of the law faculty of the Europa-Universität and was the Charles H. Stockton Professor of International Law at the U.S. Naval War College in Newport, R.I., USA. He is a member of the Council of the International Institute of Humanitarian Law in San Remo, Italy and was a member of the group of international lawyers and naval experts who produced the San Remo Manual.

15 Prof. Michael Schmitt, BA, MA, MA, LL.M, JD is Chair of Public International Law at Durham Law School, United Kingdom. He was previously Dean of the George C. Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany, and Charles H. Stockton Professor of International Law at the U.S. Naval War College in Newport, R.I., USA. He served for 20 years in the United States Air Force, specializing in operational and international law. Professor Schmitt is the General Editor of the Yearbook of International Humanitarian Law.

against the establishment of a public Commission of examination by the government instead of a public Commission of inquiry.[16] Another petition was filed on account of the absence of women members on the Commission.[17] The former petition was amended after the Government resolution of July 4, 2010, regarding the extension of the Commission's powers, and it is pending before the Supreme Court, with the consent of the parties and pursuant to the court's recommendation, until the Commission's conclusions are submitted, in view of the possibility that the issue raised in the petition may become moot. The latter petition was granted by the court, which ordered that a woman should be appointed as a member of the Commission, but it went on to hold that insofar as the appointment would be offered by a specified date to five women who had not been offered the position in the past and all of them refused it, the Government would have discharged it duty pursuant to the Women's Equal Rights Law, 5711-1951. Pursuant to the court's decision, efforts were made to find women who would agree to serve as members of the Commission. On August 18, 2010, the Minister of Justice notified the Prime Minister that an offer was made to five women who had not been offered the position in the past, and all of them refused it.[18] A notice to this effect was submitted to the Supreme Court.[19]

Deliberations of the Commission

8 It is not superfluous to emphasize from the outset that the scope of the Commission's work involves questions of both fact and law, and it follows that the examination of the facts was an essential and main element of its work. The Commission took steps to collect the information in various ways, and also heard oral and written evidence. At each stage of its work, the Commission sought to arrive independently and impartially at the truth, by means of a careful and objective consideration of the evidence that was brought before it, and with maximum transparency of its proceedings.

9 *Hearing testimonies*. In view of the importance that the Commission attached to making as much information as possible available to the public, the sessions at which testimonies were heard were open to the

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16 See HCJ 4641/10 *Uri Avneri v. Prime Minister* (submitted on Jun. 15, 2010).

17 HCJ 5660/10 *Itach - Women Lawyers for Social Justice v. Prime Minister* (still unpublished, Aug. 22, 2010) [hereinafter *HCJ 5660/10*].

18 On this matter see letter from Minister of Justice Yaakov Neeman to the Prime Minister of Israel titled "Supreme Court order in its function as high court of justice on *HCJ 5660/10*" (dated Aug. 22, 2010).

19 See state's notice regarding *HCJ 5660/10* (submitted Aug. 22, 2010).

public, even though parts of the testimonies were heard *in camera* for reasons of State security and Israel's foreign relations, pursuant to what was stated in the Government's resolution of June 14, 2010.[20] The Commission informed the witnesses that after hearing the testimonies *in camera*, it might decide to disclose parts of them. It should also be noted that the transcripts of all of the testimonies that were heard publicly were uploaded to the Commission's Internet site shortly after the testimonies were heard.[21] All of the testimonies were translated into English by means of simultaneous translation and the transcripts in English were also uploaded to the Commission's Internet site.

In total the Commission heard twenty-six testimonies during fifteen days of hearings, and eleven testimonies *in camera*. The list of the witnesses that appeared before the Commission and the dates and classified status of their testimonies are set out in annex "A".

It should be noted that the Government resolution of June 14, 2010, determined (which was also confirmed in the Government decision of July 4, 2010) that with regard to the examination of the military operations that were carried out by Israel to enforce the naval blockade on May 31, 2010, the Commission 'would be able to inspect the documents that it requires and would also be able to ask the head of the investigation team appointed by the Chief of Staff to show it the conclusions of the operational investigations that were carried out following the incident' (i.e., the final report of the military investigations that were carried out by a committee chaired by Major-General (res.) Giora Eiland; hereafter: the **Eiland Committee report**). However, it was determined that insofar as after reviewing these conclusions of the investigation the Commission would be of the opinion that 'there is a need for more thorough and extensive investigations, it could ask the head of the expert investigation team appointed by the Chief of Staff to order this to be done and to present to the Commission the conclusions of the investigations that would be carried out within this context.'

In order to ascertain the whole truth and in order to obtain closer access to the actual sources of the information, the Commission exercised the power given to it in the aforesaid Government resolution to request more thorough and extensive investigations (hereafter: **Further Debriefings of September 20, 2010**). Pursuant to the Commission's request, it was therefore resolved that a representation of the Commission

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20 See *Government Resolution of 14.6.2010*, *supra* note 6, at art. 7.

21 See *The Public Commission to Examine the Maritime Incident of May 31, 2010, available at* www.turkel-committee.gov.il.

would work with IDF personnel that were appointed for this purpose and were not involved in the incident, who would carry out further inquires for the Commission, in accordance with detailed instructions of the Commission's representation and with its assistance. Within the scope of these inquiries, documented testimonies were taken from 38 combat personnel and other IDF personnel who were directly involved in the events, and extensive additional material documenting the various aspects of the incident was received (the written statements that were provided to the Commission within this context will be referred to in this report as "testimonies"). Following this, additional supplementary inquires were carried out, in which twenty additional combat personnel and 23 combat and other IDF personnel provided additional written testimony (hereafter: **IDF Supplementary Response to the Commission's Questions of November 7, 2010; IDF Supplementary Response to the Commission's Questions of November 15, 2010; IDF Supplementary Response to the Commission's Questions of November 29, 2010; IDF Supplementary Response to the Commission's Questions of December 7, 2010; IDF Supplementary Response to the Commission's Questions of December 8, 2010; IDF Supplementary Response to the Commission's Questions of December 30, 2010**). This material enabled the Commission to make a precise examination of the whole process of taking control of the ship and the military preparations that preceded it. In order to complete the picture of the investigation, even the Chief of Staff was summoned to testify once again on October 24, 2010 (in addition to his initial testimony on August 11, 2010).

In this regard it should be noted that the Commission has decided to prohibit the publication of the names of IDF personnel that testified in the further debriefings and in the supplementary responses that were conducted by the Commission (as mentioned above), including the publication of any identifying details with regards to them, in accordance with article 11 in the government's decision of June, 14, 2010.[22]

The Commission also sought to hear testimonies from non-officials and from non-Israelis in order to receive as complete a picture as possible. On September 12, 2010, the Commission sent an invitation to testify, through the Turkish Embassy in Israel, to the captain of the *Mavi Marmara*, Tural Mahmut.[23] Furthermore, on September 28, 2010, an invitation to testify was sent to the leader of the IHH, Bülent Yildirim, which stated

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22 See *Government Resolution of 14.6.2010*, *supra* note 6, at art. 11.

23 Letter from Hoshea Gottlieb, Commission Coordinator, to the Turkish Embassy in Israel, titled "The Public Commission to Examine the Maritime Incident of May 31, 2010", no. 2010-96 (dated Sep. 12, 2010).

that the Commission would be prepared to consider various procedural solutions in order to facilitate the testimonies.[24] No response was received to these invitations.[25] On October 14, 2010, the Commission contacted the Turkish Embassy in Israel and requested its help in compiling a list of witnesses who had information and/or relevant documents and who were prepared to testify before the Commission. Once again, the Commission stated that it would be prepared to assist in finding appropriate solutions regarding the manner of hearing the testimonies and in order to facilitate them. To the Commission's dismay, this request also did not receive a response.

On October 21, 2010, an invitation was issued to the public, in which any person who had in his possession relevant information or documents on the matters within the Commission's jurisdiction was requested to submit it to the Commission. Moreover, on October 22, 2010, following a request of the British Embassy in Israel to the Israeli Ministry of Foreign Affairs, British nationals who took part in the flotilla and expressed their desire to submit evidence to the Commission were invited (through their counsel) to submit to the Commission a synopsis of the matters that they wished to bring before it so that a decision could be made with regard to the need for their testimony. The Commission also proposed, after making arrangements with the British authorities, to hear these testimonies via Video-conference. The Commission's proposal remained unanswered. On October 22, 2010, the representatives of three Israeli human rights organizations[26] and two Israeli nationals who participated in the flotilla were invited to testify, and did so, before the Commission.[27]

In these circumstances, the Commission was therefore compelled to rely mainly on testimonies and reports of Israeli parties (although it also had before it statements that were made by some of the flotilla participants during the time they were in Israel, and Commission additional written and video/photographic material that it was able to obtain). The Commission examined all of the testimonies, sources, and references critically and analytically, while cross-checking them against

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24 Letter from Hoshea Gottlieb, Commission Coordinator, to the Turkish Embassy in Israel, titled "The Public Commission to Examine the Maritime Incident of May 31, 2010", no. 2010-111 (dated Sep. 28, 2010).

25 It should be noted that in spite of the fact that the two addresses were not sent directly to the addressees but transferred through the Turkish Embassy in Israel, it may be cautiously assumed that they reached the addressees, or at the very least the addressees were made aware of their existence, in light of the broad publicity granted to them by the Turkish media.

26 See Protocol of Meeting 12 of the Commission (Oct. 13, 2010).

27 See Protocol of Meeting 14 of the Commission (Oct. 25, 2010).

each other and against additional sources of information, insofar as they were direct and authentic sources as stated in paragraph 10 below.

10 *Assembling information*. In addition to the testimonies that it heard, the Commission received as aforesaid many documents for its inspection, which were included in more than 150 files of exhibits. A list of all documents that were submitted to the Commission can be found on the Commission's website.[28]

The Commission also received various synopses on issues relating to its work (some of which were prepared at the Commission's request); transcripts of Government meetings, Cabinet meetings and inner Cabinet meetings; summaries of work meetings of various parties in the Israeli Government, the IDF and other relevant authorities; internal investigations that were carried out in the IDF (including the investigations carried out by the Navy, the head of Israel Military Intelligence and the head of the Operations Division, and a summary of the investigation of the head of the Operations Branch) and additional bodies. Apart from all of these, the Commission received, *inter alia*, documentary material that directly documented the events that occurred on the flotilla vessels, and the manner in which the flotilla participants were treated after IDF servicemen took control of the vessels, which have a very high level of credibility. Thus, for example, the Commission received thousands of video and audio clips containing hundreds of hours of audio and video recordings, which were assembled from various sources. IDF authorities submitted to the Commission material from a variety of sources, including video recordings from the security cameras on the *Mavi Marmara*, the results of recordings made by various video devices, video recordings that were made by cameras installed in the helmets of the IDF combat personnel who operated on the *Mavi Marmara*, recordings of radio reports during the incident and photographs and video recordings that were made by participants in the flotilla when they were on board the *Mavi Marmara*, by personnel from the IDF spokesperson's unit, etc. The Israeli Police submitted 46 CDs of interrogations that it conducted following the incident, and the Commission also received documentation from media sources in Israel and abroad. Moreover, the Commission received objects and documents that were seized on the *Mavi Marmara*; material that was seized from computers on the *Mavi Marmara*; medical documents and medical certificates (including documents that were received from Magen David Adom, documents that were received from the Abu Kabir Forensic Institute, documents that were received from hospitals where the injured were hospitalized and treated), etc. All of these were reviewed and examined thoroughly by the Commission and were before it when preparing this report.

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28 *The Public Commission to Examine the Maritime Incident of May 31, 2010, available at* www.turkel-committee.gov.il.

The structure of the report

11 The Commission decided to divide its report into two parts. The first part, which is being submitted now, addresses three issues:

a. The first issue concerns the legality of the naval blockade that was imposed on the Gaza Strip, pursuant to the rules of international law (paragraph 4(a) of the Government resolution of June 14, 2010). Within the framework of this examination, the Commission examined the factual basis for imposing the blockade, including the conditions for maintaining it, the restrictions on the land crossings into the Gaza Strip and the relationship between them and the naval blockade, the humanitarian situation in the Gaza Strip and the question whether the blockade is affecting this situation. Alongside all of these issues, it examined the rules of international law that apply in such situations and the manner in which they are implemented, in general and in the incident under discussion.

b. The second issue concerns the actions carried out by the IDF in order to enforce the naval blockade (paragraph 4(b) of the Government resolution of June 14, 2010). Here, the main focus is a specific and precise examination of all the actions that were taken in order to stop the flotilla and identifying the rules of international law that apply to activity of this kind, and the application thereof in the case before us.

c. The third issue, which is related to the second issue, concerns the actions of the organizers and participants of the flotilla and their identities (paragraph 4(c) of the Government resolution of June 14, 2010).[29]

12 In the second part of the report, which will be submitted at a later point in time, we shall address the question that was presented in paragraph 5 of the Government resolution of June 14, 2010, namely whether the mechanism for examining and investigation complaints and claims raised in relation to violations of the laws of armed conflict that is practiced in Israel in general, and as applied with regard to the current incident, is consistent with the duties of the State of Israel pursuant to the rules of international law. Moreover, in the second part of the report we shall consider additional questions that arose in the course of the Commission's work, including questions that have importance from a domestic Israeli perspective.

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29 By nature, these three issues are intertwined and it is certainly possible that throughout this report, specific issues will come up in more than one place. The Commission has preferred, for the sake of convenience, and in spite of the repetitiveness of this, to return and discuss these issues where they are relevant.

Chapter A:
The naval blockade of the Gaza Strip

13 In this chapter we shall survey the security situation that led to the imposition of the naval blockade on the Gaza Strip, and we shall also examine whether the naval blockade that was imposed on the Gaza Strip is consistent with the rules of international law. The legal analysis in this chapter shall be divided into several parts. In the first part of this chapter we shall present, in brief, the complex factual background concerning the legal status of the Gaza Strip, the status of Gaza's territorial waters throughout the period since the capture of the Gaza Strip in 1967, and the circumstances in which the naval blockade of the Gaza Strip was imposed on January 3, 2009.

The second part of this chapter addresses the question of what a 'naval blockade' is from a conceptual and legal viewpoint, and the source of the legal rules regulating this method of warfare, including the rules of customary international humanitarian law and the international consensus regarding the rules that govern a naval blockade.

The third part addresses the classification of the conflict in the Gaza Strip: is the armed conflict between Israel and the Gaza Strip an international or non-international one, and is the Gaza Strip a territory that is occupied by Israel? The fourth and fifth parts examine how and why the naval blockade was imposed on the Gaza Strip, the alternatives to imposing the naval blockade that were considered by Israel, the relationship between the naval blockade and the restrictions imposed by Israel on September 19, 2007, with regard to the transfer of goods by land, and whether the measures adopted by Israel are consistent with the rules of international humanitarian law that govern the imposition of a naval blockade.

The next three parts address the humanitarian aspects of the naval blockade on the Gaza Strip. Here we shall examine several controversial issues with regard to the question of imposing the naval blockade and Israel's land crossings policy. We will also asses the applicability of human rights law to the case at hand and the claim that the naval blockade imposed on the Gaza Strip by Israel is a form of collective punishment directed by Israel at the population of the Gaza.

In the final part of this chapter, we shall consider the measures that individuals or groups are permitted to utilize when they object to the legality of a naval blockade.

General background to the imposition of the naval blockade on the Gaza Strip

The status of the Gaza Strip in the years 1967-2010

14 In June 1967, during the hostilities in the Six Day War, the Gaza Strip was captured by IDF forces (in addition to other areas, including East Jerusalem, the West Bank, the Golan Heights, the Sinai Peninsula). Shortly thereafter, a military administration was established in the 'territory' (i.e., the West Bank and the Gaza Strip), which operated pursuant to the laws of belligerent occupation in international law.[30] This legal perspective regarding the laws applicable in the territory was adopted by the Supreme Court since that time.[31] It should also be mentioned that, following the Six Day War, Israeli settlement also began in the Gaza Strip.[32]

15 During the 1990s, political negotiations were held between the Palestinian Liberation Organization (hereafter: **the PLO**), as the representative of the Palestinian people, and the State of Israel, in which context a declaration of principles was signed between the parties in September 1993 with regard to interim arrangements for Palestinian self-government.[33] On May 4, 1994, the Agreement on the Gaza Strip and Jericho Area (the Cairo Agreement) was signed.[34] Following this, the IDF

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30 In fact, two separate military governments were established: one in the West Bank and the second in the Gaza Strip. See HCJ 1661/05 *Hof Azza Regional Municipality v. Israel Knesset*, 49(2) 481, at para. 3 (2005) [hereinafter matter of *Hof Azza*]. It should be mentioned that as part of these rules, Israel also applied the fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War from 1949 and the relevant guidelines from the regulations appended to the fourth Hague Convention, Respecting the Rules and Customs of War on Land, of 1907 (to which Israel is not a party, but which already at the time of the Gaza Strip's occupation was considered to reflect customary international law, see HCJ 606/78 *Aiouv v. Defense Minister*, 33(2), 113, 120 (1979); *MAG position paper*, *supra* note 1, at 3). In this context it should be mentioned that Israel has rejected the formal application of the fourth Geneva Convention regarding the West Bank and the Gaza Strip. As to the Gaza Strip, this position was based on various claims, chief among them that the strip was not part of Egypt's sovereign territory prior to its occupation by Israel (see *MAG position paper*, *supra* note 1, at 3; Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government - The Initial Stage*, *in* Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects 13, 15-16 (M. Shamgar ed., 1982); matter of *Hof Azza*, *Id.*, at para. 4.

31 *Hof Azza* case, *Id.*

32 In 2003, the number of settlers in the Gaza Strip was estimated at 8,000 people; See *Hof Azza* case, *Id.*, at para. 12 and references there.

33 Declaration of principles regarding interim agreements of self governance with PLO (signed in 1994) [hereinafter *Oslo A Accords*], *available at* www.knesset.gov.il/process/docs/oslo.htm

34 Agreement regarding Gaza Strip and Jericho region (signed in 1994) [hereinafter *Cairo*

forces withdrew from most of the territory of the Gaza Strip, except for the Israeli settlements, the main access routes to these settlements and the area of the military installations along the southern border of the Gaza Strip. Moreover, most of the administrative responsibility was transferred to the autonomous Palestinian entity that was established, the Palestinian Authority (hereafter: **the Palestinian Authority**). The Cairo Agreement also incorporated the Paris Protocol that was signed a short time earlier (on April 29, 1994), which regulated economic relations between Israel and the autonomous Palestinian entity.[35] On September 28, 1995, the parties signed an interim agreement, which incorporated the previous agreements signed between the parties (hereafter: **the Interim Agreement**).[36]

16 In October 2000, violent incidents broke out in the West Bank and the Gaza Strip, which were given the name 'the Second Intifada' by the Israeli public (the Palestinians call these incidents 'the Al-Aqsa Intifada'; the official title given to these incidents by the Israeli security establishment was the 'Ebb and Tide Events'). In these, suicide attacks were restarted in cities in Israeli territory, and from the beginning of 2001 and thereafter on an ever increasing scale, mortar and rocket attacks of various kinds were used to attack Israel, the Israeli settlements in the Gaza Strip, IDF bases in the Gaza Strip and the border crossings. Israel was no longer able to employ the measures that it had used in the past (such as administrative detentions) because of the transfer of control of significant parts of the West Bank and the Gaza Strip, and it responded in various ways, including prolonged large-scale military operations. Against this background, Israel declared that an armed conflict was taking place between it and the Palestinian terrorist organizations, and that the normative framework to be applied to the activity of the IDF was

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Agreement], *available at* www.knesset.gov.il/process/docs/cairo_agreement.htm

35 Paris protocol signed in April 1994 and included as appendix to *Cairo Agreement*, *supra* note 34, at 31.

36 Israeli-Palestinian Interim Agreement regarding the West Bank and the Gaza Strip (signed in 1995) [hereinafter *The Interim Agreement*], *available at* www.knesset.gov.il/process/docs/heskemb1.htm; the legal status of the interim agreements, particularly in all that relates to the Gaza Strip, constitutes a complex judicial issue. As a rule, even in the current time and in spite of Israel's withdrawal from Gaza (which made many clauses of the interim agreement redundant) and the Hamas's rise to power (that is, the rise to power of a party which does not recognize the interim agreements), Israel continues to apply the instructions of the agreements to the extent possible. For a review of the existing agreements and the questions that arises regarding their status see: Ruth Lapidot, *Israel and the Palestinians: Some Legal Issues* (The Jerusalem Institute for Israel Studies, 2003).

the principles and rules of the laws of war. This position was adopted by the Supreme Court in several judgments.[37]

17 In December 2003, the Prime Minister at that time, Mr. Ariel Sharon, announced a plan for the disengagement of the State of Israel from the Gaza Strip and from the area of North Samaria.[38] On September 12, 2005, the last of the IDF forces left the territory of the Gaza Strip, and the IDF Commander in the Gaza Strip signed a declaration terminating the military administration that had operated in the territory.[39] On September 20, 2005, the Minister of Interior designated five crossings and land terminals between Israel and the Gaza Strip as 'border stations,' in accordance with the power given to him pursuant to section 7 of the Entry into Israel Law, 5712-1952.[40] In November 2005, Israel and the Palestinian Authority signed a Movement and Access Agreement, in which Israel took upon itself various commitments with regard to the export of goods from the Gaza Strip and the movement of persons, and which arranged for the operation of the Rafah and Kerem Shalom border crossings, through which the movement of persons and goods was supposed to be facilitated at the Egyptian border under the supervision of a third party.[41] In December 2005, the Ministerial National Security Committee authorized the Minister of Defense to decide upon the opening or closing of the border terminals.[42]

A map of the Gaza Strip and the land crossings between it and Israel is attached to this report as annex "B".

18 In the general elections for the Palestinian Legislative Council that took place in January 2006, the Hamas[43] organization won a majority. The Hamas organization calls for the establishment of an Islamic law state in

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37 See, for example HCJ 9252/00 *El Ska v. State of Israel* (unpublished, May 23, 2001); HCJ 9293/01 *Bracha v. Defense Minister*, 56(2) 509 (2002); HCJ 3114/02 *Bracha v. Defense Minister*, 56(3) 11 (2002); HCJ 3451/02 *Almadni v. Defense Minister*, 56(3) 30 (2002); HCJ 4219/02 *Gossin v. Commander of IDF Forces in Gaza Strip*, 56(4) 608 (2002); HCJ 7015/02 *Ajuri v. Commander of IDF Forces in West Bank*, 56(6) 352 (2002); HCJ 8990/02 *Physicians for Human Rights v. Southern Command General*, 57(4) 193 (2003); HCJ 4764/04 *Physicians for Human Rights v. Commander of IDF Forces in Gaza Strip*, 58(5) 385 (2004); HCJ 769/02 *Public Committee Against Torture v. Government of Israel*, (unpublished, Dec. 14, 2006) [hereinafter *Targeted Killing* case].

38 Following the declaration the plan was brought to the Knesset's approval; See law implementing Disengagement Plan, 5765-2005, LB 1982.

39 *Manifest Regarding Termination of Military Rule* (manifest no. 6) (Gaza Region) 5765-2005.

40 See Order Regarding Entrance to Israel (border crossings) (amendment), 5765-2005.

41 Agreement regarding movement and access (signed in 2005) [hereinafter *Movement and Access Agreement*].

42 Resolution B/43 of the ministers' Commission on matters of national security (2005).

43 Initials of Harakat al-Muqāwamat al-Islāmiyyah, that is, Islamic Resistance Movement.

the whole of the territory of Mandatory Palestine, does not recognize the existence of the State of Israel and rejects reaching final agreements with it. Therefore, Israel called upon Hamas to accept the three basic conditions determined by Israel in the Government resolution of February 19, 2006,[44] which were approved in the resolution of the Quartet on the Middle East (an international body comprised of the United States, Russia, the United Nations and the European Union, which was established in 2002 at Madrid in order to oversee the resolution of the Israeli-Palestinian dispute; hereafter: **'the Quartet'**): (1) recognition of the State of Israel and repeal of Hamas's charter; (2) abandoning terrorism and dismantling terrorist infrastructure; (3) recognition of the agreements and understandings that Israel reached with the Palestinians.[45] Hamas refused to do so. In March 2006, a Palestinian government (whose territorial authority includes both the West Bank and the Gaza Strip) headed by Hamas was sworn in.[46] The Israeli Government's resolution of April 11, 2006, determined the general policy of Israel towards the Palestinian Authority following the establishment of the Hamas Government. In this context, regarding the Gaza Strip, it was resolved that 'subject to security considerations, the crossings from Israel into the Gaza Strip will remain open in order to allow the entry of humanitarian aid into the Gaza Strip.'[47]

On June 25, 2006, two IDF soldiers were killed, four were injured and Corporal Gilad Shalit was taken captive after a cell that had penetrated into Israel by means of a tunnel that was dug under the border with the Gaza Strip carried out an attack against an IDF tank. Corporal Shalit is currently still being held in captivity by the Hamas.[48]

During this period, the firing of rockets and mortars from the Gaza Strip at the towns of Southern Israel continued, as did attacks on the

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44 See Resolution 4705 of 30th Government "The Palestinian System Following Elections in Palestinian Authority - Israel's Policy in view of the Swearing in of the Palestinian Legislative Council" (Feb. 19, 2006) [hereinafter *Government Resolution of 19.2.2006*].

45 *Joint Statement by Quartet Engaged in Facilitation of Mideast Peace Process* (Jul. 16, 2002).

46 See Resolution 4780 of 30th Government ""Israel's Policy towards the Palestinian Authority upon Establishment of Hamas Government" (Apr. 11, 2006) [hereinafter *Government Resolution of 11.4.2006*]; The resolution stipulated, among other things, that the Palestinian Authority is a terrorist entity hostile to Israel and that the State of Israel will not have ties with it. See also government resolution of Feb. 19, 2006. This resolution determined, among other things, that "in light of the increasing security threat, the security examinations at border crossings will increase, particularly at Karni and Erez, in regards to people and workers as well as merchandise. Likewise there will be a continuation of the operation to upgrade the crossing in the Gaza Strip, in order to make more efficient security supervision possible."

47 *Id.*

48 For a detailed analysis, see MAG Position paper, *supra* note 1, at 8.

land crossings into the Gaza Strip. The IDF responded to these attacks by using artillery and aerial attacks, and also with operations, some of which were extensive, in the territory of the Gaza Strip. Consequently, the activity at the crossings was restricted (sometimes to the point of closing them entirely) and the Israeli security authorities were therefore required to determine priorities for goods entering the Gaza Strip, while giving preference to food products and basic products. In general, the entry of raw materials for building, industry and agriculture was also permitted, but the amount of goods exported from the Gaza Strip was restricted. This policy was approved by the Supreme Court.[49]

After a long period of tension between the Hamas and the Fatah, which led, *inter alia*, to violent incidents between the operatives of the two movements and the establishment of a unity government headed by Ismail Haniyeh in March 2007, the Hamas violently seized control of the Gaza Strip in June 2007. [50] After the Hamas seized control of Gaza, the rocket and mortar attacks on Israeli towns increased dramatically. On September 19, 2007, the Ministerial National Security Committee declared Gaza a 'hostile territory' and instructed the security establishment to impose 'additional restrictions' in the civilian sphere, including with regard to the passage of goods, the supply of oil and electricity and the movement of persons to and from the Gaza Strip.[51] Following this resolution, which expressly states that it will be implemented only after a legal examination and with the intention of preventing the creation of a humanitarian crisis in the Gaza Strip, trade with the Gaza Strip was prohibited, restrictions were imposed on the passage of goods between Israel and the Gaza Strip and the supply of fuels to Gaza was reduced.[52] It should be noted that throughout the whole period, efforts were made to continue coordination

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49 HCJ 5841/06 *The Association for Civil Rights v. Defense Minister* (unpublished, Mar. 13, 2007).

50 In response to this takeover, the Chairman of the Palestinian Authority, Mahmoud Abbas (Abu Mazen), announced the disassembly of the Palestinian Unity Government on Jun. 15, 2007, the firing of the Hamas appointed Prime Minister Ismail Haniyeh, and a general state of emergency. In addition, Abbas appointed Salam Fayyad, the Finance minister in the Unity Government, as the Prime Minister of the Palestinian Government, and outlawed Hamas' military wing.

51 Resolution B/34 of the ministers' commission on matters of national security "Israel's policy regarding Gaza (Military and Civilian)" (Sep. 19, 2007) [hereinafter *Ministers' Commission on National Security Resolution of 19.9.2007*].

52 See "Civilian Policy regarding Gaza Strip - Part A" (summation by Government Activity Coordinator in the Territories (COGAT), Aug. 31, 2010) marked by the Commission as exhibit 51 [hereinafter *Civilian Policy Regarding Gaza Strip - Part A*]; For a detailed review of Israel's border crossing policy following the resolution of the ministers' commission on matters of national security of Sep. 19, 2007, see paras. 67, 68, 73.

between the State of Israel and the Palestinian Authority (as distinct from the Hamas Government), even with regard to the Gaza Strip.[53]

19 With the assistance of Egyptian mediation, a ceasefire was reached in June 2008 for a period of six months. This was called a 'lull' (Arabic: *tahdia*). This lull collapsed in December 2008, when the rocket and mortar attacks against Israel recommenced. On December 27, 2008, Israel began a large-scale military operation in the Gaza Strip, the 'Cast Lead' operation, which lasted twenty-two days and at the end of which Israel withdrew its forces from the Gaza Strip and unilaterally declared a ceasefire.[54]

After the operation Cast Lead, on February 18, 2009, the Ministerial National Security Committee decided that, *inter alia*, Israel should continue the humanitarian effort, in coordination with the Palestinian Authority and the relevant international organizations, in order to provide the immediate and basic needs of the Palestinian population, and to this end it should allow the activity of the crossings, on a partial basis, from its territory into the Gaza Strip.[55] Nonetheless, in an affidavit signed by the Cabinet secretary that was submitted on March 31, 2009, in the State's reply to HCJ 2650/09 *Mitrael Ltd. v. Minister of Agriculture* (unpublished, April 1, 2009), it said that this decision was not intended to change Israel's fundamental policy towards the Gaza Strip and to remove the civilian restrictions imposed on it in the resolution of September 19, 2007, but merely to 'increase the list of food products whose entry into the Gaza Strip would be permitted and to give an appropriate response to the needs of the Palestinian population not involved in terrorism.'[56] Following this decision, the variety of products permitted to enter the Gaza Strip was indeed increased.[57]

On June 29, 2010, the Government announced a change of this policy and significantly reduced the restrictions on the passage of goods.[58]

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53 See expansion in paras. 66, 73.

54 Resolution B/84 of ministers' Commission on matters of national security "Declaration on cease fire concerning Operation 'Cast Lead'" (Jan. 17, 2009).

55 Resolution B/90 of ministers' Commission on matters of national security "Contact with Egypt following Operation 'Cast Lead'; Policy Regarding Response to Continued Terrorist Activity from Gaza; Abducted Soldier Gilad Shalit" (Feb. 18, 2009).

56 See the State response to HCJ 2650/09 *Mitrael LTD. v. Minister of Agriculture* (still unpublished, Aug. 22, 2010).

57 See "Civilian Policy Regarding Gaza Strip - Part B" (summation by Government Activity Coordinator in the Territories (COGAT), Aug. 31, 2010), at 56, marked by the Commission as exhibit 51 [hereinafter *Civilian Policy Regarding Gaza Strip - Part B*].

58 See Resolution B/44 of ministers' Commission on matters of national security "application of border crossing policy in relation to Gaza Strip" (Jun. 20, 2010; in the resolution the Prime Minister, Defense Minister, and Foreign Minister were authorized to make resolutions - in accordance with the opinion of the ministers' Commission on matters of national security

It was also decided that several alleviating measures would be carried out without delay, including publishing a list of items that would not be allowed into the Gaza Strip, which would 'include only weapons, military equipment and problematic dual-purpose items.'[59] Any item that did not appear on the aforesaid list would be allowed into Gaza. On December 8, 2010, the Ministerial National Security Committee further announced that subject to certain restrictions, a gradual plan for allowing goods to leave the Gaza Strip for places outside of Israel and the West Bank would be approved.[60]

The territorial waters of the Gaza Strip in the years 1967-2010

20 Prior to the implementation of the disengagement plan and as long as the State of Israel exercised effective control over the Gaza Strip, the IDF operated with regard to the territorial waters off the Gaza Strip with all of the powers given to the party in control of a certain territory with respect to the territorial waters adjoining that territory, including control of the passage of naval transportation for security reasons. In 1968, the IDF Commander in the Gaza Strip determined that the Gaza Strip was a closed area, and permission was required to enter it and depart from it in any way, including by sea.[61] It should be noted that during the whole of the aforesaid period, Gaza did not have a port that could service international maritime transport, but only an anchorage for fishing boats.

21 The political agreements with the Palestinians, as discussed, retained this authority with the IDF. These agreements provided, *inter alia*, that the State of Israel would have full control and sole security authority in the territorial waters adjoining the Gaza Strip[62] and that ships of the Israel Navy would be permitted to sail in this area, as needed and

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- regarding steps and specific actions to enforced a border crossing policy in relation to the Gaza Strip; On Jun. 20, 2010 the Prime Minister's office announced undertaking a series of steps in order to "prevent the entrance of weaponry and combat-supportive materials into Gaza, and at the same time expand the manner of civilian merchandise's entrance into the Strip." See statement by Prime Minister's office regarding Israel's policy towards the Gaza Strip following the security cabinet meeting (Jun. 20, 2010).

59 *Id.*, at para. 1.

60 Resolution B/64 of the ministers' Commission on matters of national security (Dec. 8, 2010).

61 An order regarding the closing of the region (Gaza Strip and North Sinai) (no. 144), 5728-1968, as amended in order no. 191 and order no. 847.

62 The security arrangements regarding the Gaza Strip's naval space were initially determined in the *Cairo Agreement*, *supra* note 34; Afterwards they were absorbed into the *Interim Agreement*, *supra* note 36, in article XIV of appendix I.

without restriction, and take all of the necessary steps against shipping vessels suspected of terrorist activity or illegal activity, including against ships suspected of smuggling weapons, drugs, etc.[63] The agreements also provided that the issue of international maritime transport to and from the Gaza Strip will be settled in final arrangement negotiations between the parties (negotiations that have not ended). The agreement also provided that until a suitable port is established in the Gaza Strip, foreign ships will not be allowed into an area extending to a distance of 12 nautical miles from the coast, and that the entry of passengers and goods via the sea would be possible only through Israeli ports, pursuant to the rules and regulations applying to this matter in Israel.[64] It should be noted that after the Interim Agreement was signed, negotiations were begun between Israel and the Palestinian Authority with regard to the construction of a port in Gaza and several steps were even taken towards this goal, but the project was stopped when the Second Intifada broke out in the year 2000.[65] As stated above, the question of the status and application of the Interim Agreement today is complex and controversial. Moreover, the Military Advocate-General's Office pointed out to the Commission the a difficulty in relying on the Interim Agreement to prevent the entry of ships sailing under a foreign flag into the territorial waters of the Gaza Strip, since they are not a party to or bound by the agreement.[66]

22 Over the years, several shipping vessels have tried to reach the Gaza Strip by sea. In the last decade, these attempts have become more frequent, and weapons have been found on board some of the ships that were seized on their way to the Gaza Strip. Thus, for example, in May 2001 the *Santorini* left Lebanon for the Gaza Strip. This ship was seized by the Israeli navy and brought to Israel. Many weapons were found on the ship, including anti-tank RPGs (Rocket Propelled Grenades), Kalashnikov rifles, etc. In May 2003, the *Abu Hassan* was seized on its way from Lebanon to the Gaza Strip. A Katyusha fuse and weapons were found on the ship, as well as a Hezbollah operative. On January 3, 2002, the *Karine A*, which set sail from Iran, was seized with approximately fifty tons of weapons on board, including rockets, mortars, anti-tank missiles, mines, assault rifles, etc., which were intended for the Gaza Strip.

23 When the disengagement plan was implemented and the military administration in the Gaza Strip ended, the IDF was of the opinion that, in consequence, it no longer had the powers that it received pursuant

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63 *Id.*
64 *Id.*
65 See *MAG position paper*, *supra* note 1.
66 *Id.*

to the laws of occupation under international law and Israeli security legislation. In view of the armed conflict with the Hamas Government in the Gaza Strip, the Military Advocate-General examined the actions of the IDF in the territorial waters of the Gaza Strip pursuant to the laws of naval warfare.[67]

24 In July 2008, various flotillas whose stated destination was the Gaza Strip were organized. In view of the fact that the ships concerned were neutral, the IDF had relatively limited options, which mainly included the power of visit and search, a power that can be used, *inter alia*, on condition that there are reasonable grounds for suspecting that a ship is subject to capture.[68] The IDF expressed the concern that because of the need for this condition to be satisfied, the measures available to the IDF were insufficient to prevent attempts to smuggle weapons into the Gaza Strip.[69]

25 On August 13, 2008, the Shipping Authority at the Ministry of Transport published a Notice to Mariners (hereafter: **NOTMAR**),[70] calling upon shipping to refrain from entering the territorial waters off the Gaza Coast and stating that it would be possible to transport humanitarian supplies to Gaza by means of the land crossing, by arrangement with the Israeli authorities:

> 'The Israel Navy is operating in the maritime zone off the coast of the Gaza Strip. In light of the security situation, all foreign vessels are advised to remain clear of area A in the attached map […]
>
> Delivery of humanitarian supplies to the civilian population in the Gaza Strip is permitted through the land crossings between Israel and the Gaza Strip, subject to prior coordination with the Israeli Authorities.'[71]

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67 *Id.*, at 35.

68 For expansion on this matter see para. 54 below.

69 See *MAG position paper*, *supra* note 1, at 39.

70 Advisory Notice (Maritime Zone off The Coast of Gaza Strip), no. 6/2008 (Aug. 11, 2008), *available at* en.mot.gov.il/index.php?option=com_content&view=article&id=74:no62008 &catid=17:noticetomariners&Itemid=12; See also protocol of meeting 3 of the Commission "Defense Minister's open door testimony" 17 (Aug. 10, 2010) [hereinafter *Defense Minister's Open Door Testimony*]; protocol of meeting 4 of the Commission "Chief of Staff's open door testimony" 13 (Aug. 11, 2010) [hereinafter *Chief of Staff's Open Door Testimony of 11.8.2010*]. These testimonies are accessible to the public at the Commission's website, *available at* http://www.turkel-committee.gov.il.

71 The map attached to the notice to mariners, as well as a list of exact coordinates, are attached as appendix C of this report. In para. 3 of the notice to mariners it is mentioned that the entry of foreign vessels into the maritime zone adjacent to the Gaza Strip is also prohibited according to the agreements between Israel and the Palestinian Authority.

The Military Advocate-General expressed his opinion before the Commission that this constituted a declaration that the maritime zone near the coast of the Gaza Strip was a 'combat zone' or an 'exclusion zone,' but he said that there was a dispute on the question of what are the powers given to a State that declares such a maritime zone.[72]

Despite the aforesaid NOTMAR, on August 20, 2008, two yachts set sail from Larnaca in Cyprus in the direction of the Gaza Strip, with forty passengers on board (the yachts *Liberty* and *Free Gaza*). Prior to this flotilla, which the IDF gave the name of 'Winds of Heaven 1,' the Navy determined an operational plan and defined operational possibilities, which including transmitting diplomatic messages, and also considered the possibility of stopping ships before they set sail or stopping them without the use of force during the voyage. Moreover, it considered the possibility of taking control of ships or, alternatively, of allowing ships to reach the Gaza Strip. Pursuant to a decision of the political echelon (the Prime Minister and the Minister of Defense),[73] the yachts were permitted to enter the Gaza Strip. Four additional yachts that left Larnaca port on separate occasions during the months of August-December 2008 were also permitted to enter Gaza. In their testimonies before the Commission, various parties said that the reasons for allowing the yachts to pass included, *inter alia*, the difficulty in carrying out searches on these boats, the thought that allowing them to pass would prevent repeated occurrences of the phenomenon and taking into account that these were relatively small yachts that according to intelligence did not present a real danger of carrying weapons.[74] Another ship (the *Al Marwa*), carrying a Libyan flag, which tried to reach the Gaza Strip on November 29, 2008, turned back after messages were transmitted to it that it was on course for an area where security activity of the Israeli Navy was taking place.[75] On December 29, 2008, another yacht (the *Dignity*) left Larnaca port with 25 passengers on board ('Winds of Heaven 2'). The Navy ordered the ship to turn back and not to enter the area adjoining the Gaza Strip because of the military operations in the area. During the incident, the yacht hit the bow of a Navy vessel and was damaged, but it made its way without assistance to the port of Beirut in Lebanon.[76] The IDF once again expressed the concern that in view of the dispute on the question of the legal ramifications of declaring an area a 'combat zone' or

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72 See *MAG position paper*, *supra* note 1, at 38-39.
73 See *Defense Minister's Open Door Testimony*, *supra* note 70, at 20-21.
74 *Id.*, at 19-21; *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 11.
75 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 11.
76 *Id.*, at 12; *Defense Minister's Open Door Testimony*, *supra* note 70, at 12-21.

an 'exclusion zone,' the NOTMAR did not provide a complete solution to the difficulties that arose when the IDF dealt with the various flotillas.[77]

26 In these circumstances, on January 3, 2009, during the operation Cast Lead, the Minister of Defense ordered a naval blockade off the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast. The significance of imposing a naval blockade according to the rules of international law is that it allows a party to an armed conflict to prevent entry into the prohibited area of any vessel that attempts to breach the blockade (even without it being established that the vessel is assisting terrorist activity). Consequently, a NOTMAR was published in the following terms:

> 'All mariners are advised that as of 03 January 2009, 1700 UTC, Gaza maritime area is closed to all maritime traffic and is under blockade imposed by Israeli Navy until further notice.
>
> Maritime Gaza area is enclosed by the following coordinates […].'[78]

The notice was published on the IDF web site, on the web site of the Shipping Authority and the Ministry of Transport, and on several standard international channels, such as NAVTEX; an international satellite network that collects and distributes notices to vessels worldwide.[79] Moreover, this notice was broadcast twice a day on the emergency channel for maritime communications to ships that sailed at a distance of up to 300 km from the Israeli coast.[80] The Minister of Defense testified before the Commission that in any case of an attempt to transport humanitarian supplies by sea, the vessels would be directed to Ashdod port and the humanitarian supplies on board would, after inspection, be sent to the Gaza Strip via the land crossings.[81]

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77 See *MAG position paper*, *supra* note 1, at 39; See also letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Major General Eli Marom, Commander of the Navy (Dec. 29, 2008); letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Lieutenant General Gabi Ashkenazi, IDF Chief of Staff (Dec. 30, 2009); "The Public Commission to Examine the Maritime Incident of May 31, 2010" (position paper by the IDF Military Advocate General - Appendix, July 2010), marked by the Commission as exhibit no. 13 [hereinafter *MAG position paper - Appendix*]. In these letters, the Military Advocate General underlined the need to declare a naval blockade that would provide the navy with the proper tools and authorities to deal with the phenomenon of civilian vessels wishing to reach the Gaza Strip.

78 Advisory Notice (Blockade of Gaza Strip), no. 1/2009 (Jan. 3, 2009), *available at* 199.203.58.11/EN/index.php?option=com_content&view=article&id=124:no12009&catid=17:noticetomariners&Itemid=12.

79 See *IDF Answer to Commission's Completion Request of 15.11.2010*, marked as exhibit 145 of the Commission's exhibits.

80 See *Defense Minister's Open Door Testimony*, *supra* note 70, at 23.

81 *Id.*, at 24.

A map of the territorial waters of the Gaza Strip, including the blockaded area is attached to this report as annex "D".

In January 2009, during operation Cast Lead, two ships; the general cargo ship *Iran Shahed* and the *Spirit of Humanity*, decided not to breach the naval blockade as they had intended after naval forces sent them warnings not to enter the area ('Winds of Heaven 3' and 'Winds of Heaven 4,' respectively).

27 After operation Cast Lead ended, the resolution regarding the imposition of a naval blockade remained in force. In his testimony before the Commission, the Prime Minister Mr. Benjamin Netanyahu confirmed that the resolution to impose the naval blockade was not reexamined after the operation ended.[82]

In February 2009, the general cargo ship *Tali*, which left the port of Tripoli in Lebanon, tried to reach the Gaza Strip ('Winds of Heaven 5') with weapons on board. In June 2009, the vessel *Arion* tried to reach the Gaza Strip with 30 passengers on board ('Winds of Heaven 6'). It also carried humanitarian equipment (medications, infant formula, a few toys, some olive tree saplings, etc.) and bags of cement. The two ships were seized by the Navy, without the use of force, after they failed to heed warnings sent to them. The ships were brought to Ashdod port, proceedings were begun to expel the passengers from Israel and the humanitarian supplies on board were sent to the Gaza Strip through the United Nations after a security inspection.[83]

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82 See protocol of meeting 2 of the Commission "Prime Minister's open door testimony" 17-18 (Aug. 9, 2010) [hereinafter *Prime Minister's Open Door Testimony*].

83 It should also be noted that in the period from February 2009 to January 2010 a number of land convoys attempted to enter Gaza through its border with Egypt. A land convoy headed by a British Member of Parliament which included 3,000 participants was permitted to enter the Strip through the Rafah crossing. An additional convoy including 225 participants was allowed to enter the strip in July 2009 in a reduced capacity including 55 activists and 50 vehicles. In December 2009 another convoy departed from a number of countries in Europe. The Turkish organization named the IHH, whose participation in the flotilla we will discuss later, assisted in the transportation of participants from Turkey to El Arish. After the Egyptians placed various limitations on the convoy only about half the provisions were permitted to enter the Gaza Strip through the Rafah border crossing. In addition, there were rioting by the participants in the El Arish region and confrontations with the Egyptian security forces. During the confrontations, about 50 participants of the convoy were injured, including five in a critical manner. The leader of the IHH Bülent Yıldırım later admitted that during the confrontation seven Egyptian soldiers were taken hostage; See also: *IICC report* (Jun. 20, 2010) (all of the reports received from the IICC were marked by the Commission and are found in an exhibit marked by the Commission as folder no. 150; hereafter, all of the exhibits in this binder will be called "*IICC report*" and will be distinguished by their date of issuance); *IICC report* (Jul. 19, 2010).

The Questions before the Commission

28. In this part of the report, the Commission will address the following questions:

a. What is a naval blockade, and what are the legal rules that govern the imposition and the actual enforcement of such a blockade?
b. Did Israel act in accordance with these rules?
c. What legal obligations does Israel have vis-à-vis the Gaza Strip? Does the naval blockade have an impact on the humanitarian situation in the Gaza Strip that renders it contrary to international law?
d. Do individuals or groups have a right under international law to disregard an established blockade?

The Conformity of the Naval Blockade with International Law

The legal framework

The concept of a 'naval blockade' in general

29. The term "blockade" is frequently used to cover diverse and often complex military operations.[84] While the term blockade is sometimes used to refer to land operations, the most common context in which the term appears is in naval operations. Historically, the concept differed only slightly from the concept of a 'siege'[85] but it should be emphasized that a naval blockade is not identical to a siege. Whereas a siege means the encircling of the enemy's military forces; a strategic fortress; or any other location defended by the enemy, and cutting it off from support and supply lines, a naval blockade describes a wider variety of operations.[86] Thus, for

84 The Charter of the United Nations: A Commentary; Vol I 755 (Bruno Simma et al. eds., 2nd ed., 2002):

85 "The concept of blockade does not assume a technical law-of-war sense, but rather points to military action with a view to sealing off particular coasts or land areas".
The term "Blockade" is defined in the online Oxford Dictionary (2010) as:
"an act or means of sealing off a place to prevent goods or people from entering or leaving: *they voted to* **lift the blockade** *of major railway junctions*. Origin: late 17th century: from block + -ade, probably influenced by *ambuscad*".
Wolff Heintschel von Heinegg, *Naval Blockade*, 75 Int'l L. Stud. Ser. U.S. Naval War Col. 203, 205 (2000).

86 Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 133 (2004):

example, in a current collection of articles published as *Naval Blockades and Seapower: Strategies and Counter-Strategies, 1805-2005* (hereafter: *Naval Blockades and Seapower*), it has been noted that:

> '… while legal definitions of naval blockades attempt to be precise, the range of activities that have historically fit under this rubric are vast indeed.'[87]

Naval Blockades and Seapower provides eighteen examples of maritime blockade operations including those that were conducted during the two World Wars, in the conflict between the People's Republic of China and the Republic of China (Taiwan) (in 1949-1958), in the Korean War (1950-1953), during the Cuban Missile Crisis (1962), in the Vietnam War, during the sanctions against Iraq (1990-2003), etcetera.[88] Naval blockades were also imposed, *inter alia*, in the Bangladesh Liberation War in 1971; by Egypt against the city of Eilat and the Gulf of Aqaba in 1967, and on the Bab el-Mandeb Strait in 1973;[89] during the Iran-Iraq War of 1980-1988,[90] and by Israel on the coasts of Lebanon during the Second Lebanon War (March 2006).[91] The variety of examples and contexts in which naval blockades were imposed shows the range of military actions that have historically been included in the term 'naval blockade.' While a strict legal assessment might challenge whether some of these operations meet the technical legal requirements of a 'blockade', it is clear that preventing the enemy from having access to the maritime area on which the blockade has been imposed, and preventing it from being able to receive supplies and assistance via that area, was and remains an integral part of this

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87 "Siege warfare is conducted by encircling an enemy military concentration, a strategic fortress or any other location defended by the enemy, cutting it off from channels of support and supply".
L. Oppenheim, International Law: A Treatise; Vol II: Disputes, War and Neutrality 768 (7th ed., H. Lauterpacht ed., 1952):
"Blockade must not be confused with siege, although it may take place concurrently with siege".
Naval Blockades and Seapower: Strategies and Counter-Strategies 1805-2005 4 (Bruce A. Elleman & S.C.M. Paine eds., 2006).

88 *Id.*; see also ix-xi (details of different subjects in table of contents).

89 *Heintschel von Heinegg*, *Int'l L. Stud*, *supra* note 85, at 211-212.

90 *Id*.

91 Anthony H. Cordesman, George Sullivan & William D. Sullivan, Lessons of the 2006 Israeli-Hezbollah War 131-135 (Significant Issues Series 29(4), 2007); Wolff Heintschel von Heinegg, *Blockade*, Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum, ed., 2010), *available at* www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e252&recno=3&author=Heintschel_von_Heinegg_Wolff [hereinafter *Heintschel von Heinegg*, *EPIL*]. nd a naval blockade was imposed by Israel on the coasts of Lebanon during the Second Lebanon War (March 2006).he dispute sized

method of warfare.[92] Indeed, imposing naval blockades is 'a basic and fundamental activity of navies.'[93]

30. The imposition of a naval blockade may have various purposes. One purpose is the strategic military one of frustrating giving possible aid to the enemy's military operations or preventing the transport of weapons or supplies to a military force operating in the country whose coast is subject to the blockade.[94] However, a unique aspect of blockade as a method of warfare is that "in view of its impact on the commercial relations between the blockaded belligerent and neutrals, a blockade is regularly considered a method of economic warfare."[95]As the eminent Israeli international scholar and former member of this Commission, the late Ambassador Shabtai Rosenne noted, one of the greatest advantages of a naval blockade is the ability to effectively cripple an enemy's external trade, which is a legitimate object in armed conflict.[96]

The legal sources

31. The law of the sea, which is the legal framework that normally applies in times of peace, constitutes one of the oldest fields in international law. Much of the law of the sea is codified by the United Nations Convention on the Law of the Sea of December 10, 1982 (hereafter: **UNCLOS**).[97] The State of Israel is not a party to this convention, but it is bound by those provisions that are regarded as having customary status.[98] For our purposes, two basic principles in the law of the sea are of particular importance: (1) sovereignty of the flag State, which means that ships on the high seas (i.e. in international waters) are subject to the

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92 See, for example, U. S. Navy, The Commander's Handbook On The Law Of Naval Operations 4-9 (2007); See also *Heintschel von Heinegg, Int'l L. Stud, supra* note 85, at 211.

93 Naval Blockades and Seapower, *supra* note 87, at xviii.

94 See Constantine John Colombos, The International Law of the Sea 716-717 (1967); Oppenheim, *supra* note 86, at 769-770.
(who both use the term "strategic" when referring to a blockade that forms part of other military operations and "commercial" when the object of the blockade is to cut off all trade from the blockaded area).

95 *Heintschel von Heinegg, EPIL, supra* note 91, at para. 1; see also Hersch Lauterpacht, International Law: Collected papers; Volume 5: Disputes, War and Neutrality, parts ix-xiv 661 (Elihu Lauterpacht ed., 2004); Colombos, The International Law of the Sea, *Id.*

96 Shabtai Rosenne, *Modern Blockade: Some Legal Aspects*, 23 British Year Book of Int'l Law 346, 347-353 (1946).

97 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

98 Transcript of session no. 4 "Testimony of the Military Advocate-General" (August 26, 2010), at 32 [hereinafter *Military Advocate-General's testimony*].

jurisdiction of the State whose flag they bear;[99] (2) freedom of the high seas, which is a fundamental principle in modern law of the sea, meaning, *inter alia*, that all ships are entitled to complete freedom of movement in the high seas. Impeding the freedom of navigation of a ship on the high seas is likely to be regarded as a violation of the sovereignty of the flag State, unless consent of the flag State has been obtained or if permitted on another ground in international law. This principle applies not only in times of peace, but also to neutral shipping in times of armed conflict.

Admittedly, there have been proposals to prohibit use of the sea for military purposes altogether, but these efforts have encountered opposition. The laws of the sea do not operate in isolation from other rules and principles of international law,[100] in particular, the admissibility and legality of military uses of the sea derive from the laws of naval warfare, rules of neutrality, and principles of customary international law.[101] Accordingly, in times of armed conflict, the law of naval warfare, as *lex specialis*, prevails over the law of the sea.[102] In other words, the rules of international law permit a belligerent Party to restrict the operation of neutral vessels, with the result that some of the rights of neutral nations are set aside in favor of a State engaged in the armed conflict.[103]

32. The rules that regulate the imposition of a naval blockade are part of the laws of naval warfare and most of the have the status of customary international law. Customary international law is an integral part of Israeli law.[104] Indeed, attempts were made in the Paris Declaration of 1856 and the London Declaration of 1909 to codify the rules, but the Paris Declaration was signed by only seven States and the London Declaration was never given binding force; however, it is accepted that the customary

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99 A third principle of importance is the principle of territorial waters, according to which, unlike the arrangement which applies to international waters, in a country's territorial waters vessels are not allowed freedom of movement. These waters are under the jurisdiction of the coastal country and it is authorized to prevent vessels from entering it, excluding places where this is required within the frameworks of "innocent passage," that is, a passage necessary for quick and efficient arrival at the vessel's destination (including the port of said country) or dictated by force majeure or the vessel's distress, and which does not disrupt the peace, order, or security of the coastal country. See *Military Advocate-General's testimony*, *supra* note 98, at 33. *MAG position paper*, *supra* note 1, at 33.

100 See the introduction to UNCLOS, *supra* note 97: "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

101 For additional analysis of the law see George P. Politakis, Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality (1998); Wolff Heintschel von Heinegg, Seekriegsrecht und Neutralität im Seekrieg (Berlin, 1995).

102 International Law Association, Committee on Maritime Neutrality, *Final Report to the Sixty-Eighth Conference* 496-521, at 498 (London 1998).

103 Oppenheim, *supra* note 86, at 769-770.

104 *Targeted Killing* case, *supra* note 37, at para. 19.

international humanitarian law governing blockades is largely based on the London Declaration of 1909.[105]

The development of these customary rules over the twentieth Century saw a number of disagreements, such as what constituted "effectiveness" (a requirement for naval blockades, discussed below) with regard to the imposition of a naval blockade, and whether it is permitted to operate vessels at a distance from the coast of a party to the conflict, ultimately being resolved.[106] In the two World Wars, states did not act in accordance with the rules appearing in the London Declaration of 1909,[107] which gave rise to the question whether this method of warfare had fundamentally changed.[108] However, despite the challenges presented by such large-scale conflicts, since 1945, States have, in general, taken care to operate within the limitations of the traditional rules governing blockades.[109]

33. At the end of the twentieth century, it became clear that it was necessary to update the understanding of the rules governing blockades because of the dated nature of the law; the introduction of new technology and modern methods and means of warfare; the development of the law governing armed conflict after the Second World War, including the First Additional Protocol to the Geneva Conventions; and developments in other fields of international law, such as the law of the sea, the United Nations Charter, environmental protection law, and laws of aerial

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105 See *Heintschel von Heinegg*, *Int'l L. Stud*, *supra* note 85, at 205-213 for a brief history of the development of naval blockade laws, particularly his statements on page 214:

106 "In general States are willing to accept the customary character of the principles laid down in the 1909 London Declaration".
See also, *Collections of Documents on the Law of Armed Conflict, Hague Conventions, Geneva Conventions & Additional Protocols, Charter of the United Nations, UNCLOS, Other Treaties and Related Canadian Statutes (Concerning general land, sea, air, neutrality, humanitarian law, disarmament and anti-personnel land mines* (Directorate of Law Training, ed., 2005), *available at* www.forces.gc.ca/jag/publications/Training-formation/coll_docs_LOAC-DDCA_2005_eng.pdf.
Heintschel von Heinegg, *Int'l L. Stud*, *supra* note 85, at 205-213.

107 See *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at 205-209, which explains that the blockade system made use of terms like "continuous voyage" when the ships sailing to a neutral port could be captured, if their final destination was a port under blockade and long distance blockades were made possible by technological advancement such as long range artillery, submarines, and military aircrafts, who have made a blockade close to the enemy's shore impossible to supervise. See also, Geoffrey Till, *Naval Blockade and Economic Warfare in the European War, 1939-45,* in Naval Blockades and Seapower, *supra* note 87, at 123 (regarding the Navicert certification system which was employed by British clerks abroad during the second World War, which approved cargoes and even whole ships); Rosenne, *Modern Blockade*, *supra* note 96, at 347-349.

108 *Heintschel von Heinegg*, *Int'l L. Stud*, *supra* note 85, at 211-212.

109 *Id.*, at 211; see also *U.S. Navy, The Commander's Handbook*, *supra* note 92, at para. 7.7.5.

warfare.[110] In the years 1988-1994, a group of experts engaged in an attempt to combine the rules governing the law of naval warfare with innovations and new trends in this field. The result was the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea (hereafter: **San Remo Manual**), which offers a detailed current statement of the customary international law of naval warfare, including naval blockades. This manual will serve as the primary basis for the legal analysis of the issues before the Commission. However, since some of the provisions in the San Remo Manual are regarded as reflecting a progressive development of the law rather than merely a restatement thereof, the analysis below is also based on other accepted texts and manuals in order to identify areas where there may not be complete international consensus on the San Remo rules.[111] However, it should also be noted that the areas of divergence are limited.

34. Due to the influential role that the United States Navy plays in naval matters, reference will also be made to the *2007 Commander's Handbook On The Law Of Naval Operations NWP 1-14M* (hereafter: **the U.S. Navy Commander's Handbook**).[112] Manuals of other states regarding the law of armed conflict [113] and academic texts[114] will serve as additional sources. The *2009 Harvard Manual on International Law Applicable to Air and Missile Warfare* (hereafter: **the Harvard Air and Missile Warfare Manual**);[115] although it concerns aerial rather than naval blockades

110 See San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Louise Doswald-Beck ed., 1995) [hereinafter *San Remo Manual* when referring to the provisions, and *San Remo Explanation* when referring to the accompanying explanatory text].

111 *San Remo Explanation* (preface).

112 See also *U.S. Navy, The Commander's Handbook*, *supra* note 92.

113 For example, *The Manual of The Law of Armed Conflict: UK Ministry of Defence* (2004), *available at* www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/LegalPublications/LawOfArmedConflict/ [hereinafter *The UK Manual*]; the *Canadian Law of Armed Conflict at the Operational and Tactical Level* (2001), *available at* www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf [hereinafter *The Canadian Manual*]; THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck, ed., 1st ed., 1995 and 2nd ed., 2008) (the key statements in the Handbook of International Humanitarian Law were promulgated for the German Bundeswehr as Joint Services Regulations (ZDv) 15/2 to guide the conduct of military operations) [hereinafter *The German Manual*, when referring to its key statements, or *International Humanitarian Law Handbook*, when referring to its commentaries].

114 DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, *supra* note 86; LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2nd ed., 2000); *International Humanitarian Law Handbook*, *supra* note 113, *Id*.

115 Humanitarian Policy and Conflict Research at Harvard University (HPCR), 'The Commentary on the Humanitarian Policy and Conflict Research (HPCR) Manual on International Law Applicable to Air and Missile Warfare', (Mar. 2010), *available at* http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf. [hereinafter *The Air and Missile Warfare Manual*].

(even when enforced by military planes, as in the operations to enforce the naval blockade on May 31, 2010), also provides a useful benchmark against which to assess the degree to which a consensus in the applicable law has developed over time.[116]

The legal definition of the term 'naval blockade' and the rules governing its imposition and enforcement

35. A widely accepted definition of the term 'blockade' can be found in the U.S. Navy Commander's Handbook:

> 'Blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation.'[117]

36. Provisions 93-104 of the San Remo Manual cover the imposition and enforcement of a naval blockade. These rules provide that a blockade should be declared and notified;[118] such a declaration should specify the commencement, duration, location and extent of the blockade;[119] the blockade must be 'effective';[120] the force maintaining the blockade may be stationed at a distance from the coast determined by military requirements;[121] the blockade may be enforced by a combination of legitimate methods and means of warfare;[122] access to the ports and coasts of neutral States may not be blocked;[123] the blockade should be applied impartially to the vessels of all States;[124] and any cessation, temporary lifting, re-establishment, extension or other alteration of a blockade must be declared and notified.[125]

The San Remo Manual also specifically addresses the humanitarian aspects of imposing and enforcing of a naval blockade, and prohibits the imposition of a naval blockade if its sole purpose is to starve the civilian

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116 *Id.*; The Air and Missile Warfare Manual represents the "most up to date re-statement of existing international law applicable to air and missile warfare, as elaborated by an international Group of Experts" of blockade law at least where the use of aircraft is concerned.

117 See also *U.S. Navy, The Commander's Handbook*, *supra* note 92, at para. 7.7.1; *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 1 (which adopts the same definition).

118 See *San Remo Manual*, *supra* note 110, at 26, rule 93.

119 See *Id.*, at rule 94.

120 See *Id.*, at rule 95.

121 See *Id.*, at rule 96.

122 See *Id.*, 27, at rule 98.

123 See *Id.*, at rule 99.

124 See *Id.*, at rule 100.

125 See *Id.*, at rule 101.

population, or prevent objects essential for its survival.[126] Further, the imposition of a naval blockade is also prohibited if the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.[127] This is the principle of 'proportionality.' Moreover, subject to certain conditions, the blockading party must provide free passage of foodstuffs and other essential objects if the civilian population is inadequately provided with these supplies.[128] Similarly, subject to the right of the blockading party to prescribe the technical arrangements, the passage of medical supplies to the civilian population or the wounded and sick members of enemy forces must be permitted.[129]

As noted, the rules that concern the imposition and enforcement of a naval blockade apply during armed conflict. Therefore, the analysis will now turn to examine the question of the nature of the conflict in the Gaza Strip, because this determination impacts the assessment of the naval blockade imposed by Israel.

The conflict in the Gaza Strip

The classification of the conflict between Israel and the Hamas and the implications of this classification for the naval blockade

37. International law distinguishes between two types of armed conflict: international armed conflict and non-international armed conflict. In the traditional-formal sense, international humanitarian law classified 'international armed conflict' as war between States.[130] According to this approach, a conflict between a State and a non-state actor would be regarded as a non-international armed conflict. However, in reality, the complexities of modern warfare pose a significant challenge when classifying an armed conflict, since not all armed conflicts can be easily classified within the framework of the traditional definition.

38. The importance of classifying the armed conflict between Israel and the Hamas is a consequence of the fact that the international community is more willing to accept the imposition of a naval blockade within the

126 See *Id.*, at rule 102(a).
127 See *Id.*, at rule 102(b).
128 See *Id.*, at rule 103.
129 See *Id.*, at rule 104.
130 See Green, The Contemporary Law of Armed Conflict, *supra* note 114, at 54, where he mentions that the classic approach is that international law deals only with relations between countries. As a result of this, the conflict between countries is what this law regulates.

framework of an international armed conflict. This is likely the result of two interrelated factors. First, the rules governing naval blockades were developed within the framework of international conflicts, whereas, traditionally, States have demonstrated a reluctance to apply international humanitarian law to internal disputes. Second, the imposition of a naval blockade usually causes a disruption of trade with parties that are neutral to the conflict; an activity usually carried out by States or with their approval. Therefore, States have a particular interest in the issue of when and how naval blockades are instituted and enforced.

39. Naval blockades have, nevertheless, been imposed in non-international armed conflicts (which is not surprising in view of the large number of internal armed conflicts relative to the number of international armed conflicts throughout history). In certain situations, States have imposed a military or economic blockade against an enemy that is not a *de jure* government.[131] Historically, in order for the rules of international humanitarian law that govern international armed conflicts to apply to non-international ones, recognition of a 'belligerency' was required of other States. Such recognition was limited to circumstances in which the level of the conflict has reached 'a certain threshold of intensity manifesting a situation similar to that of a war between states.'[132] However, it should be noted that this has become less important and today is almost irrelevant.[133]

40. The Military Advocate-General, Major-General Avichai Mandelblit, testified before the Commission on the difficulty of classifying the conflict between Israel and the Hamas terrorist organization.[134] In his testimony,

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131 See also *Prosecutor v. Tadic*, Appeals Judgment, No. IT-94-1-A, para. 84 (July 15, 1999): "[i]t is indisputable that an armed conflict is international if it takes place between two or more States".
See also *Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory*, I.C.J., (Jul., 2004) at 56, para. 139, *available at* www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm [hereinafter *the Wall* case] (where the ICJ indicated that the exercise of inherent right to self-defense under s. 51 of the United Nations Charter is only available where there has been an attack by one State against another State).
The most famous example of such a blockade was the blockade placed by Union states on the Confederate states during the American Civil War between 1861-1865. In the period following the Second World War, we may name the conflict of the "nationalists" with the People's Republic of China (1949-1958). See e.g., Colombos, International Law of the Sea, *supra* note 94, at 714-730 (for references to historical examples of blockades by and against insurgents) and David G. Surdam, *The Union Navy's Blockade Re-considered*, *in* Naval Blockades and Seapower, *supra* note 87, at 61.

132 Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law 17 (2010).

133 *The UK Manual*, *supra* note 113, at 382; See also Cullen, *supra* note 132, at 22-23.

134 *Military Advocate-General's testimony*, *supra* note 98, at 11-19; Israel and several other States have recognized the Hamas as a terrorist organization: these include the United States (www.state.gov/s/ct/rls/other/des/123085.htm), Canada (www.publicsafety.gc.ca/

he said that after Operation Cast Lead, Israel adopted the position that it is bound by the laws of war that apply to both international armed conflict and non-international armed conflict.[135] The Military Advocate stated that, in practice, the IDF therefore focuses on compliance with the rules of international humanitarian law.[136]

41. While armed conflicts with non-State parties have been recognized as a non-international in character,[137] this approach has not been universally adopted. For example, there is a consensus that the conflict between the State of Israel and the Hamas is an international armed conflict, although the reasons that have led various parties to this conclusion vary, as we shall see below.

Indeed, in HCJ 769/02 *Public Committee Against Torture v. Government* [2006] (4) TakSC 3958; [2006] (2) IsrLR 459 (hereafter: **the Targeted Killings case**), the Supreme Court of Israel adopted the position that international humanitarian law applies to an armed conflict between Israel and terrorist organizations not merely in an area that is subject to occupation, but 'in any case of an armed conflict of an international character - in other words, one that crosses the borders of the state - whether or not the place in which the armed conflict occurs is subject to a belligerent occupation.'[138] The Israel Supreme Court has implemented this approach consistently in several judgments that addressed the issue of entering Israel via the crossings between it and the Gaza Strip.[139] In additional judgments, the Israel Supreme Court has gone on to hold that although the Gaza Strip is no longer occupied,[140] it is subject to those provisions in the Fourth Geneva Convention and the First Additional Protocol that reflect customary international law and apply only where there is an international armed conflict.[141]

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prg/ns/le/cle-eng.aspx#Hamas) and the European Union (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:178:0028:0030:EN:PDF).

135 *Military Advocate-General's testimony*, *supra* note 98, at 91.

136 *Id.*, at 75-76.

137 See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

138 See *Targeted Killing* case, *supra* note 37, at paras. 18.

139 See for example HCJ 201/09, 248/09 *Physicians for Human Rights v. Prime Minister* (still unpublished. Jan. 19, 2009) 10, para. 14:
"The normative arrangements that govern the armed conflict between the State of Israel and the Hamas organization are complex. They revolve around the international laws relating to an international armed conflict. Admittedly, the classification of the armed conflict between the state of Israel and the Hamas organization as an international conflict raises several difficulties. But in a host of judgments we have regarded this conflict as an international conflict."

140 See for example HCJ *9132/07 Al-Bassiouni v. Prime Minister* (unpublished, Jan. 30, 2008) [hereinafter *Al-Bassiouni* case], at para. 12.

141 *Id.*, at paras. 12-15.

The Supreme Court of Israel is not alone in classifying the conflict between Israel and the Hamas as an international armed conflict. Various United Nations organizations, humanitarian organizations, and human rights organizations also classify the conflict between Israel and the Hamas as an international armed conflict, although the reasons that led them to this conclusion differ. This classification is largely a result of the position of these organizations that the Gaza Strip is, even today and despite Israel's disengagement from the Gaza Strip in 2005, a territory occupied by Israel.[142] No doubt consistent with their humanitarian focus, the approach that Israel is an occupying power vis-à-vis the Gaza Strip optimizes the argument that the provisions of the Fourth Geneva Convention regarding the protection of civilians in a territory that is subject to a belligerent occupation apply to the population of Gaza. Since an occupation can only exist within the context of an international armed conflict, the position that the Gaza Strip is subject to an occupation necessarily leads to the conclusion that the conflict in the Gaza Strip is international in character.[143]

42. However, even if the conflict in the Gaza Strip were to be classified as a non-international armed conflict, it would appear that the rules of international humanitarian law regarding naval blockades would still be applicable given the decline of the doctrine of 'recognition of belligerency;[144] the increasing acceptance by courts and tribunals to apply international

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142 See *Human Rights Watch: I Lost Everything*, *available at* www.hrw.org/en/reports/2010/05/13/i-lost-everything (2010), at 117.

143 Yoram Dinstein, The International Law Of Belligerent Occupation 276-280 (2009);
Amnesty International: Occupied Palestinian Territories: The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability, available at www.amnesty.org/en/library/asset/MDE15/007/2009/en/4c407b40-e64c-11dd-9917-ed717fa5078d/mde150072009en.html#1 (2009).
Human Rights Watch: Israel: 'Disengagement' Will Not End Gaza Occupation, *available at* www.hrw.org/english/docs/2004/10/29/isrlpa9577.htm (2004).
ICRC: Dignity Denied in the Palestinian Territories, *available at* www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-report-131207 (2007).
United Nations: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/498/94/PDF/N1049894.pdf?OpenElement (2010).
Gisha: Disengaged Occupiers: The Legal Status of Gaza, *available at* www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf (2010).
B'Tselem: Israel's Obligations According to International Law, *available at* www.btselem.org/hebrew/gaza_strip/israels_obligations.asp.
See *International Humanitarian Law Handbook*, *supra* note 113, at 272:

144 "The law of belligerent occupation applies in international armed conflict only".
See also Dinstein, The International Law Of Belligerent Occupation, *supra* note 142, at 33.
See *The UK Manual*, *supra* note 113, at 382; See also Cullen, *supra* note 132, at 22-23.

humanitarian law to internal conflicts;[145] the consensus that is developing among legal experts regarding customary law rules applicable in non-international conflict;[146] and the difficulty previously discussed in classifying contemporary armed conflicts. In light of the aforesaid, it is likely there will be a willingness on the part of courts and other bodies to recognize that the rules governing the imposition and enforcement of a naval blockade are applicable to non-international armed conflicts.[147] A step in this direction was taken in the San Remo Manual, where it is stated that although its provisions were intended to apply mainly in situations of international armed conflicts at sea, this fact was not stated expressly in order not to deter the application of the manual's provisions to non-international armed conflicts, insofar as they involve naval warfare:

> "However, it should be noted that although the provisions of this Manual are primarily meant to apply to international armed conflict at sea, this has intentionally not been expressly indicated in paragraph 1 in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations."[148]

43. In light of this complex reality and in the absence of a general consensus under international law regarding the classification of such conflicts, the approach presented by the Military Advocate-General before the Commission; that Israel is bound by international humanitarian law regardless of the classification of the conflict, is an understandable and practically focused one. It should also be noted that the imposition of the naval blockade on the Gaza Strip is not the first case in which Israel has confronted these difficulties. For example, while the international community had difficulty in classifying the armed conflict between Israel and the Hezbollah organization in Lebanon in 2006,[149] that did not stop recognition of the naval blockade that Israel imposed during that conflict.

44. In view of the aforesaid, the Commission has examined the conditions for imposing and enforcing the naval blockade on the Gaza Strip on the basis of the assumption that the conflict between Israel and

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145 See, for example, *Prosecutor v. Tadic*, *supra* note 130, at paras. 65-142.

146 Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

147 This should not be interpreted in any way to suggest that the historic doctrine of "belligerency" is applicable or appropriate in this case. As has been noted, it is a doctrine widely recognized to have fallen into disuse. Further, the application of such a doctrine implies a level of legitimacy that should not be applied to a recognized terrorist entity.

148 See *San Remo Explanation*, *supra* note 110, at 73.

149 Noam Lubell, Extraterritorial Use of Force Against Non-State Actors 250-254 (2010).

Hamas is international in character. However, it should be noted that given the degree of *de facto* control that the Hamas exercises over the Gaza Strip; the significant security threat that it presents; and its attempts to import weapons, ammunition and other military supplies, *inter alia*, by sea; the Commission would have considered applying the rules governing the imposition and enforcement of a naval blockade even if the conflict between Israel and the Gaza Strip had been classified as a non-international armed conflict.

Is the Gaza Strip an occupied territory?

45. In *Al-Bassiouni v. Prime Minister*, the Supreme Court of Israel held that since the disengagement in 2005, Israel does not have 'effective control' over the Gaza Strip. Because of the importance of this conclusion, the actual wording of the Supreme Court is cited below:

> '… since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip.'[150]

In its judgment, the Supreme Court further held that the main obligations imposed on the State of Israel vis-à-vis the inhabitants of the Gaza Strip derive from the existence of an armed conflict between Israel and the Hamas organization; the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip; and the relationship of dependency that was created - at least in certain spheres, such as the electricity supply to the Gaza Strip - during the long period of military rule in the Gaza Strip.[151] The court also held, in accordance with the position presented by the State, that Israel is subject to the rules of customary international law that apply in armed conflict, including the requirement to permit the passage of 'food and basic humanitarian supplies necessary for the survival of the civilian population.'[152]

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150 *Al-Bassiouni* case, *supra* note 140, at para. 12.
151 *Id.*
152 *Id.*, at para. 14.

As previously noted, notwithstanding the Supreme Court's holding, several organizations have adopted the position that despite the disengagement, the Gaza Strip continues to be under Israeli occupation. This position is mainly based on the claim that although Israel no longer has a permanent military presence in the Gaza strip, Israel's control of several areas that effect the fabric of life in the Gaza Strip amount to 'effective control' of the Gaza Strip. For example, the organization Gisha - Legal Center for Freedom of Movement presented before the Commission its position that Israel effectively continues to control the Gaza Strip for six reasons: (i) Israel controls movement to and from the Gaza Strip via land crossings; (ii) Israel exercises complete control over Gaza's airspace and territorial waters; (iii) Israel controls movement within Gaza through periodic incursions and a "no-go zone"; (iv) Israel controls the Palestinian population registry; (v) Israel exercises control over Gaza's tax system and fiscal policy; (vi) Israel exercises control over the Palestinian Authority and its ability to provide services to Gaza residents.[153] A similar position was also presented by the representatives of the B'Tselem organization in their testimony before the Commission.[154]

46. Indeed, academics have diverging opinions as to whether Israel has 'effective control' over the Gaza Strip.[155] Certainly, the adoption of the position that Israel continues to be an occupying power in the Gaza strip requires an unjustifiably flexible and novel interpretation of the term 'effective control.' In other words, this interpretation would have to be based on the understanding that two different opposing powers can exercise 'effective control' in a territory at the same time: the Hamas and Israel. Moreover, the interpretation of the term 'effective control' needs to be assessed against the currently accepted approach in international law that 'occupation' does not merely require military forces to be stationed

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153 *Disengaged Occupiers*, *supra* note 142.

154 Transcript of session no. 12 "Testimony of member of the B'Tselem organization" (Jessica Montel & Eyal Hareoveny) (Oct. 13, 2010), at 2:
"There is a dispute regarding the question of whether Gaza is still subject to Israeli occupation. There is no doubt that Israel does not currently have effective control in all aspects of life in the Gaza Strip, but it has such control in a few very central areas; in the air space, the maritime space, the population registry, the entry and exit of people and of cargo".

155 For examples of the viewpoints of some leading Israeli scholars, see Dinstein, Belligerent Occupation, *supra* note 142, at 12-30 (reaching the conclusion that Israel continues to be an occupying force); Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement* 8 Y. B. Int'l. Hum. Law 369 (2005) (reaching the conclusion that the disengagement Plan led to the transfer of effective control of the entire Gaza Strip to the Palestinian Authority).

in a certain territory, but also that the occupying power performs the functions of an existing government.[156]

Indeed, during the long period that Israel had the Gaza Strip under effective control, the Gaza Strip did become dependent on Israel in certain spheres. However, as the Supreme Court of Israel held in *Al-Bassiouni v. Prime Minister*, this dependency is insufficient to establish 'effective control.' It should also be stated, *inter alia*, that insofar as the conclusion that Israel is an occupying power in the Gaza Strip derives from Israel's control of the airspace of the Gaza Strip, there is no support in international law for the proposition that the control of airspace amounts to 'effective control.'[157] With regard to land access to the Gaza Strip, it should be noted that the Gaza Strip also has a border crossing with Egypt (the Rafah crossing), even though Egypt, for its own reasons, also exercises control of the crossing from its territory into the Gaza Strip.[158] Similarly, the imposition of a naval blockade does not create a situation in which the laws of occupation come into effect. It should be emphasized that the very lack of 'control' over the land territory in the Gaza Strip in the traditional sense of this term is what makes an external naval blockade necessary to control access to and egress from that territory. As a comparison, a land siege does not automatically result in the besieged city being held under occupation. States, and particularly those that might employ navies or air forces, either unilaterally or within the framework of a coalition, will likely be wary of accepting the argument that the mere imposition of a naval blockade or influence over events on the shore of a State by the use of military power automatically creates a situation of occupation.

If Israel did indeed have effective control over the Gaza Strip, then it would have the power to act as the authority responsible for maintaining order in the Gaza Strip. The Israeli forces would then be able to wait on the coast of the Gaza Strip and intercept the vessels there. In practice, however, Israel does not control the coast of the Gaza Strip. This area is under the 'effective control' of the Hamas. The lack of effective control

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156 See *Case Concerning Armed Activities On The Territory Of The Congo*, I.C.J., 231(2005) *available at* www.icj-cji.org/docket/files/116/10455.pdf (where it was held the physical stationing of troops at an airport and the existence of "administrative control" was not sufficient to establish occupation in the sense of article 42 of the Hague Regulations).

157 *Bankovic v. Belgium and Others* 123 I.L.R. 94 (2001) (where NATO's control over the airspace of Federal Republic of Yugoslavia during the 1999 bombing campaign was rejected as a basis for arguing "effective control").

158 It should be noted that at a later stage, we will maintain that the fact that there is an additional border crossing between Egypt and the Gaza Strip does not diminish Israel's humanitarian responsibility for the situation in the Gaza Strip. Here, we are dealing with a question of a different nature, namely the question of "effective control" of the Gaza Strip.

over the Gaza Strip, including the ability to impose order there, and the security threat that the Hamas presents to the naval forces operating near the coast of the Gaza Strip, clearly indicate the underlying logic of international law that permits the enforcement of a naval blockade at some distance from the coast. Similarly, it is difficult to see how the Gaza situation differs in a practical sense from Lebanon in 2006, when the blockading Israeli warship INS *Hanit* was hit by a missile launched by Hezbollah from the Lebanese coast.[159] In light of the fact that the territorial waters of the Gaza Strip contain mainly small vessels that are capable of moving at high speeds, Israel's naval forces are confronted with a significant risk.[160] Examples such as the attack on the *USS Cole* in 2000 in Yemen and the attack on the French supertanker *Limburg* in 2002 highlight both the threat presented by small vessels and the difficulty in stopping them.[161]

47. An examination of the arguments, both individually and cumulatively, therefore leads to the conclusion that Israel does not have 'effective control' in the Gaza Strip. Therefore, in alignment with the Supreme Court of Israel, the Commission takes the position that Israel's effective control of the Gaza Strip ended when the disengagement was completed in 2005.

Israel's imposition of the naval blockade

The purpose of the naval blockade

48. According to the testimonies before the Commission, the Government of Israel imposed the naval blockade on the Gaza Strip on January 3, 2009, for military-security reasons, which focused on preventing weapons, ammunition, military supplies, terrorists and money from entering the Gaza Strip, and the need to prevent the departure of terrorists, vessels filled with explosives and other maritime borne threats from Gaza.[162] The various witnesses emphasized the large amount of weapons that can be smuggled by sea in one single operation

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159 See Cordesman et al., *supra* note 91, at 131-135.

160 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 34-35.

161 See Thad Allen, *Friend or Foe? Tough to Tell*, 134 Proceedings Magazine (2008), *available at* www.usni.org/magazines/proceedings/2008-10/friend-or-foe-tough-tell.

162 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, *at* 28; *Military Advocate-General's testimony*, *supra* note 98, at 25; Transcript of session no. 7 "Testimony of Major-General Eitan Dangot, Coordinator of Government Activities in the Territories" (Aug. 31, 2010), at 134 [hereinafter *Testimony of Government Activity Coordinator in the Territories*]; *Defense Minister's Open Door Testimony*, *supra* note 70, at 22.

and therefore the danger that this route presents.[163] The purpose of the naval blockade was, therefore, to restrict the military resources available to the Hamas for carrying out hostilities against Israel.

49. A few officials, including the Military Advocate-General, took care in their testimony to distinguish between the 'purpose of the naval blockade' and 'Israel's border crossings policy,' i.e., the policy relating to the land border crossings with the Gaza Strip that Israel adopted after September 19, 2007, when the Ministerial National Security Committee decided to impose restrictions on the goods entering the Gaza Strip; on the movement of persons; and on the supply of electricity and fuel to the Gaza Strip, as a result of Hamas's rise to power.[164] They emphasized in their testimonies that the naval blockade was not imposed to disrupt the commercial relations of the Gaza Strip, for the reason that there is no commercial port on the coast of the Gaza Strip, and therefore there has been no maritime commerce via the coast of the Gaza Strip in the past.[165] As a result, the maritime activity in the Gaza Strip was limited to fishing, whereas any such commerce went via the Israeli port of Ashdod or the Egyptian port of El Arish.[166] The Military Advocate-General testified before the Commission that the IDF was compelled to find a suitable operational solution for the maritime zone in view of the increase in the phenomenon of flotillas bound for the Gaza Strip.[167] The Military Advocate-General further clarified that the possibility of imposing a naval blockade, specifically, arose in discussions held by the IDF with regard to the appropriate methods of contending with the phenomenon of the flotillas. A naval blockade was regarded as the best operational method of dealing with the phenomenon[168] because other solutions, such as the use of the right of visit and search, were proved to be problematic and other sources of authority were regarded as weaker.

This can also be seen from written material that was submitted to the Commission, which includes legal opinions, summaries of meetings, and letters that were written during the period that preceded the imposition

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163 *Israel's Actions to Prevent the Arrival of Vessels to Gaza's Shore* 8 (Opinion of Political-Security Branch, Aug. 3, 2010) [hereinafter *Opinion of Political-Security Branch*]; see also *Prime Minister's Open Door Testimony*, *supra* note 82, at 7; *Defense Minister's Open Door Testimony*, *supra* note 70, at 8; *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 6-7.

164 *Military Advocate-General's testimony*, *supra* note 98, at 25; *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 134.

165 *Military Advocate-General's testimony*, *supra* note 98, at 77.

166 *Id.*

167 *Military Advocate-General's testimony*, *supra* note 98, at 14-17.

168 *Id.*

of the naval blockade. Thus, for example, already on August 3, 2008, the legal advisor of the Israeli Navy wrote an opinion dealing with the powers of the Navy to stop foreign vessels off the coast of the Gaza Strip. The opinion, which was written in the context of operational deployment of the Navy prior to the arrival of a flotilla with two yachts flying Greek flags, surveyed in great detail the applicable law and the various possible actions open to the Navy, while mentioning the limitations faced by the Navy. In her 'Recommendations for further treatment,' she wrote: 'As stated, in the current security… in order that the IDF should have the powers required to deal with ships reaching the Gaza Strip, I recommend considering a "naval blockade" on the Gaza Strip (with an official announcement), which will restrict the entry of foreign shipping vessels into the Gaza Strip…'[169] An opinion with a similar conclusion was given by the International Law Department at the headquarters of the Military Advocate-General's Office on August 6, 2008.[170] On August 11, 2008, the Military Advocate-General approached the Attorney-General and brought to his attention the recommendation of the Military Advocate-General's Office as well as various legal disagreements that arose in this regard with the legal adviser of the security establishment, the legal adviser of the Ministry of Foreign Affairs and the legal adviser of the Israel Police. The Military Advocate-General also requested holding a meeting on the subject, with the participation of all of the relevant parties, in order to formulate a settled legal position.[171] On the same day the Military Advocate-General apprised the Chief of Staff in writing that he had spoken with the Attorney-General, who also expressed the position that the declaration of a naval blockade on the Gaza Strip gave the 'optimal legal-operational solution to preventing the entry of foreign shipping vessels into the Gaza Strip, and gave the Navy all of the tools and powers required to prevent the passage of shipping vessels. The sources of authority that allow action to be taken against shipping vessels, in the absence of a declaration of a "naval blockade," are weaker, and their practicability is doubtful.'[172] From the materials submitted to

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169 See "the Navy's authorities regarding foreign ships off the shore of the Gaza Strip" (opinion by the navy's legal advisor, 3.8.2008) *MAG position paper - Appendix*, *supra* note 77.

170 See "the Navy's authorities regarding foreign ships off the shore of the Gaza Strip" (opinion by the Chief Military Advocate General - Department of International Law, 6.8.2008) *MAG position paper - Appendix*, *supra* note 77.

171 See letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Yehuda Weinstein, Attorney General (11.8.2008) *MAG position paper - Appendix*, *supra* note 77.

172 See first letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Lieutenant General Gabi Ashkenazi, IDF Chief of Staff (11.8.2008) *MAG position paper - Appendix*, *supra* note 77.

the Commission, it appears that the Attorney-General agreed on the whole but thought that the issue required a practical solution within the authority of the political echelon and recommended holding a discussion at that level.[173]

On December 29, 2008, the Military Advocate-General once again approached the Navy Commander when, in the situation assessments that took place during Operation 'Cast Lead,' the question of how to deal with civilian shipping vessels that might try to reach the coast of the Gaza Strip arose once again. In his letter, the Military Advocate-General said that 'in view of the intensive combat operations taking place at this time in the Gaza Strip' (i.e., Operation 'Cast Lead'), he thought it right to recommend once again the imposition of a naval blockade on the Gaza Strip, even though no decision had yet been made on this issue.[174] On December 30, 2008, the Military Advocate-General once again contacted the Chief of Staff and said that in the early hours of the morning the Navy forces were required to contend with the yacht *Dignity* that left Cyprus for the Gaza Strip and that the incident highlighted the legal difficulty of dealing with foreign civilian shipping vessels trying to reach the coast of the Gaza Strip. He once again asked the Chief of Staff to bring his recommendation of a naval blockade before the political echelon.[175]

From a memorandum of the Minister of Defense it would appear that on December 30, 2008, a request was received from the Prime Minister's military secretary to act to impose a naval blockade, and that on December 31, 2008, a request was received by his military attaché from the Chief of Staff's office in this regard. On January 3, 2009, after the security establishment's legal advisor gave his opinion on the subject, the Minister of Defense signed an order to impose the blockade.[176]

50. It should be noted that, the leader of the opposition - who was Minister of Foreign Affairs at the time of imposing the naval blockade on the Gaza Strip, MK Tzipi Livni, said in her testimony that the imposition of the naval blockade, even though it was not done in order to disrupt the

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173 See second letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Lieutenant General Gabi Ashkenazi, IDF Chief of Staff (11.8.2008) *MAG position paper - Appendix*, *supra* note 77.

174 See letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Major General Eli Marom, Commander of the Navy (29.12.2008) *MAG position paper - Appendix*, *supra* note 77.

175 See letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Lieutenant General Gabi Ashkenazi, IDF Chief of Staff (30.12.2009) *MAG position paper - Appendix*, *supra* note 77.

176 See Defense Minister's Memorandum, 21 (30.8.2010), marked by the Commission as exhibit 53 [hereinafter *Defense Minister's Memorandum*].

commercial relations of the Gaza Strip, was done in a wider context, as part of Israel's comprehensive strategy (which she referred to as a 'dual strategy') of delegitimizing Hamas on the one hand and strengthening the status of the Palestinian Authority vis-à-vis the Gaza Strip on the other. Pursuant to this strategy, Israel does not recognize Hamas, yet it continues to act and uphold, insofar as possible, the interim agreements with the Palestinian Authority. According to her approach, the broad context is not merely the war on terror, but also the political ability to reach agreements between Israel and the Palestinian Authority since the attempts to transfer goods to the Gaza Strip by sea (despite Israel's offer to transfer humanitarian supplies to the Gaza Strip via the land crossings) is contrary to the arrangements determined in the interim agreements (according to which Israel will retain control of the territorial waters of the Gaza Strip until the final arrangement is reached) and it also gives legitimacy to the Hamas regime in the Gaza Strip, and harms the ability to reach future agreements between Israel and the Palestinian Authority.[177] MK Livni also stated that it would be a mistake to examine the circumstances of imposing the naval blockade from a narrow security perspective only.[178]

Similarly, in a document dated August 3, 2010, Major-General (res.) Amos Gilad, the head of the Political, Military and Policy Affairs Bureau at the Ministry of Defense gave details of the security and political reasons that led to imposing the naval blockade on the Gaza Strip. The document contains two considerations: one, which is mentioned as the main consideration, is to prevent any military strengthening of the Hamas; the other, which is mentioned alongside the security consideration, is to 'isolate and weaken Hamas.' In this context, Major-General (res.) Gilad stated that the significance of opening a maritime route to the Gaza Strip was that the Hamas' status would be strengthened significantly from economic and political viewpoints. He further stated that opening a maritime route to the Gaza Strip, particularly while it is under Hamas control, rather than within the framework of a political agreement between Israel and the Palestinians, would be tantamount of 'a very significant achievement for Hamas and the "path of resistance" in the internal arena, at the expense of Abu Mazen's government and the "path of agreements".'[179] Major-General (res.) Gilad concluded:

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177 Transcript of session no. 14 "Leader of the Opposition Tzipi Livni's open door testimony" 2-3 (Oct. 25, 2010) [hereinafter *Leader of the Opposition Tzipi Livni's open door testimony*].

178 See *Id.*, at 3: "The narrow security view, which is correct for such a body, in my view does somewhat of a disservice in the broader matter based upon which Israel could basically be granted legitimacy for actions which are security actions".

179 *Opinion of Political-Security Branch*, *supra* note 163, at 9, paras. 49-52.

> 'In summary, the need to impose a naval blockade on the Gaza Strip arises from security and military considerations of great weight, which are mainly the need to prevent a military strengthening of terrorists in the Gaza Strip, the entry of terrorists and the smuggling of weapons into the Gaza Strip by sea, and also to prevent any legitimization and economic and political strengthening of Hamas and strengthening it in the internal Palestinian arena.'[180]

It would therefore appear that even though the purpose of the naval blockade was fundamentally a security one in response to military needs, its imposition was also regarded by the decision makers as legitimate within the concept of Israel's comprehensive 'dual strategy' against the Hamas in the Gaza Strip.

Alternatives to the naval blockade

51. From the material that was submitted to the Commission, it is evident that Israel - even though it was not obliged to do so under the rules of international law - imposed the naval blockade only after other options were considered. These included stopping and searching shipping vessels with consent, declaring a 'maritime zone,' and exercising the authority of 'visit and search.' During an armed conflict, it is lawful to impose a naval blockade, without considering alternatives, as long as the naval blockade itself satisfies the requirements of international humanitarian law. Rather, the analysis of the options demonstrates the degree to which Israel carefully considered the decision to impose a blockade.

52. *The power to stop and search ships with consent*. According to the principle of the freedom of the high seas in the law of the sea, as discussed above, there is a very limited authority to interrupt the voyage of a vessel in international waters and carry out a consensual search. While there are States that claim the consent of the ship's master is sufficient, the general view appears to be that the consent of the flag State is required.[181] In any event, virtual certainty that consent for a search would not be granted by the Masters of the ships bent on reaching Gaza limited the utility of following that option. The consent of the flag State provides a stronger legal basis for carrying out a search of a vessel. However, it was not certain that the consent of the flag State would actually be obtained, and,

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180 *Id.*, at 9, para. 53.

181 See UNCLOS, *supra* note 97, at art. 110 (UNCLOS generally limits the right of a warship to visit a foreign ship to situations where there is grounds for suspecting that a vessel is involved in piracy, slave trade, unauthorized broadcasting, is without nationality or in fact of the same nationality as the warship).

in any case, it is not possible to ensure that the consent would be given in a timely manner.

53. *Declaration of a 'maritime zone.'* International humanitarian law permits a party to a conflict to limit the activity of a neutral vessel (including taking control of the communications of a neutral vessel)[182] in or close to an area where naval military activity is taking place, as well as the establishment of maritime zones (or 'exclusion zones').[183] The possibility of creating a 'maritime zone' limiting access to the Gaza strip by the area where combat activity is taking place was not merely considered by Israel in theory, but was also implemented in practice.[184] As stated above (para. 25) on August 13, 2008, a NOTMAR was published, calling for all foreign vessels in the area not to enter the maritime zone adjacent to the Gaza Strip. The NOTMAR also stated that humanitarian aid would be transferred to the Gaza Strip via the existing land crossings. However, there is a lack of clarity in the law as to whether such a zone provides an authority to only search for contraband. Notwithstanding this NOTMAR, flotillas whose declared destination was the Gaza Strip continued to arrive. In the period between the months of August-December 2008, the Government of Israel even permitted six vessels to enter the Gaza Strip. The increasing interest in opening a maritime route to the Gaza Strip aroused grave concern in the security establishment that a permanent 'maritime traffic route' to the Gaza Strip would be created, since it could be abused for smuggling military supplies and terrorists.[185]

54. *Right of visit and search*. Another option considered by Israeli authorities was the exercise of the right of visit and search. As indicated in the U.S. Navy Commander's Handbook, the law of neutrality - a part of the law of armed conflicts that defines the rights of parties that are not involved in the armed conflict - does not prohibit commerce between a neutral State and a party to an armed conflict. However, a neutral government cannot itself supply war materials without it being regarded as a breach of neutrality. Moreover, a neutral government 'may forbid its citizens from carrying on non-neutral commerce with belligerent nations,'[186] but it is not required to do so.

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182 See *U.S. Navy, The Commander's Handbook*, *supra* note 92, at 7-11, para. 7.8; See also *San Remo Manual*, *supra* note 110, at rule 108.

183 See *U.S. Navy, The Commander's Handbook*, *supra* note 92, at 7-12, para 7.9; See also *San Remo Manual*, *supra* note 110, at rule 105.

184 *San Remo Manual*, *supra* note 110, at rule 119.

185 *MAG position paper*, *supra* note 1, at 39.

186 See *U.S. Navy, The Commander's Handbook*, *supra* note 92, at para. 7.4.

In order to ensure that cargo that is supplied to a party to a conflict does not breach the rules of neutrality, the laws of naval warfare grant 'a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.'[187] An accepted definition of the concept is found in the U.S. Navy Commander's Handbook:

> 'Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature (contraband[188] or exempt "free goods") of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict.'[189]

However, a key requirement is that such a right cannot be arbitrarily exercised. The challenge that confronted the Israeli authorities was to obtain sufficient information regarding the cargo and/or personnel on board the vessels in order to find a ground for suspicion that the vessel is engaged in transporting contraband, enemy combatants, is presenting fraudulent documentation, is contributing to the enemy's military activity, and similar actions.[190] In addition, exercising the right of visit and search at sea can be a complex process in view of the size of merchant vessels, practical difficulties that have arisen with regard to searching the cargo on vessels, the weather, limited naval resources and the need to carry out other operations.

55. None of the alternatives discussed above provided the means to comprehensively prevent the import of arms, ammunition, and war materials. Moreover, these alternatives did not provide authority to stop terrorists and vessels from leaving Gaza. Here it should be recalled that the Hamas has proven time and again its intention to camouflage its activity behind a civilian cloak. Therefore, it is legitimate for Israel to carefully scrutinize every action of the Hamas in order to determine whether it constitutes a threat to Israel's armed forces or its citizens. Imposing a naval blockade is therefore the only measure that gives authority under international humanitarian law to prevent the departure of vessels from the area where the naval blockade has been declared. It should also be pointed out that imposing a naval blockade is the method of warfare that

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187 See *San Remo Manual*, *supra* note 110, at rule 118.

188 See *San Remo Manual*, *supra* note 110, at rule 148 (defining contraband as "goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict").

189 See *U.S. Navy, The Commander's Handbook*, *supra* note 92, at para. 7.6.

190 See *San Remo Manual*, *supra* note 110, at rule 146.

interferes the least with neutral shipping, at least in principle, mainly for the reason that this method of warfare is restricted geographically to the specific area that is subject to the naval blockade, unlike the right of visit and search which can be exercised anywhere, except in the territorial waters of a neutral State.[191]

Given the aforesaid, Israel ultimately decided that imposing a naval blockade provided the most efficient and comprehensive legal tool to confront the prevailing security threat, which, as stated above, constitutes a legitimate method of warfare.

Israel's Compliance with the Legal Rules Governing a Naval Blockade

Commitment to the rules of international law

56. The analysis will now turn to the question of whether Israel complied with the conditions required for the imposition and enforcement of a naval blockade. The material before the Commission clearly shows that all of the organs of the State of Israel (the Government, the IDF, the Military Advocate-General, the Ministry of Foreign Affairs and the Attorney-General) made great efforts in order to comply with the technical legal rules governing the imposition of a naval blockade. The Government of Israel consulted military and civilian legal experts regarding all aspects of the comprehensive planning. From the first discussion of whether a naval blockade was to be introduced, it appears that there was a commitment to two principles: first, the blockade would be imposed pursuant to the rules of international law, i.e., Israel committed itself to follow the widely accepted legal limitations of a traditional blockade as reflected in the *San Remo Manual*. Second, the blockade would be imposed subject to Israel's legal obligations regarding provision of humanitarian assistance.

57. As stated above, the technical legal requirements for imposing a naval blockade can be found, *inter alia*, in articles 93-101 of the San Remo Manual.[192] The evidence before the Commission shows that Israel complied with the conditions regarding the effectiveness of the blockade,[193]

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191 *Id.*

192 *San Remo Manual*, *supra* note 110, at rule 93-101; See also *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at paras. 28-40.

193 *San Remo Manual*, *supra* note 110, at rule 95; *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at paras. 33-37 (as far as is known, the blockade has prevented all ships from accessing the coast of the Gaza Strip since the time of its establishment).

impartiality in imposing it[194] and non-interference with ports and coasts of neutral States.[195] One aspect of the technical compliance with the law governing blockades that warrant comment is the duty to give notice of the imposition of a blockade, and especially the duty to give notice of the 'duration' of the naval blockade.

'Notice' of the imposition and duration of a naval blockade

58. The requirement of giving notice of a naval blockade appears, *inter alia*, in articles 93-94 of the San Remo Manual. Although the London Declaration of 1909 provides that notice of the imposition of a naval blockade should be given to neutral States by sending messages to their governments, today the accepted opinion is that publishing a 'Notice to Airmen' and a 'Notice to Mariners' satisfies the requirement of the article.[196] The Commentary to the San Remo Manual is of no assistance in this regard, since it merely states that article 94 of the San Remo Manual is 'self-explanatory.'[197]

In the case at hand, the State of Israel took the following steps in order to give notice of the naval blockade: from the testimony of the Military Advocate-General, Major-General Avichai Mendelblit, it can be seen that the Military Advocate-General's Office asked the Ministry of Transport to transmit information regarding the imposition of the naval blockade by all methods at its disposal, in order to ensure that the notice would reach all vessels in the Mediterranean Sea. This was also done. The notice was also published on the Internet sites of the IDF, the Shipping Authority, the Military Advocate-General, and the Ministry of Transport, and, as noted above, via several international channels. The announcement was also transmitted twice a day via the emergency channel for maritime communication to all ships within a distance of up to 300 kilometers from the Israeli coast.[198] In addition, notices were also sent to the flag States

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194 *San Remo Manual*, *supra* note 110, at rule 100; See also *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 40 (it appears that Israel has not authorized any vessel to access the coast of the Gaza Strip since the establishment of the blockade; as a result, Israel has not discriminated between vessels of different nationalities when enforcing the blockade).

195 *San Remo Manual*, *supra* note 110, at rule 99; See also *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 38 (there is no evidence that the blockade interferes with any ports or coasts outside the Gaza Strip).

196 See *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 31.

197 *San Remo Explanation*, *supra* note 110, at 177, para. 94.1.

198 *Defense Minister's Open Door Testimony*, *supra* note 70, at 29-30; *Military Advocate-General's testimony*, *supra* note 98, at 74.

and the States that Israel knew intended to send ships to the area.[199] These steps clearly satisfy the requirement of 'notice.'

59. An issue that requires consideration in this context is whether Israel complied with the condition that notice should be given of the 'duration' of the naval blockade. The NOTMAR of January 3, 2009, states that 'Gaza maritime area is closed to all maritime traffic and is under blockade imposed by the Israeli Navy until further notice'.[200]

The requirement that the duration of the naval blockade (hereafter: **the duration**) should be stipulated from the outset is stated in the San Remo Manual (article 94),[201] in the Harvard Air and Missile Warfare Manual (rule 148(b)),[202] and in the UK[203] and Canadian[204] Manuals (which adopted the provisions of the San Remo Manual). It is not, however, required by the 1909 London Declaration, nor does it appear in the U.S. Naval Commander's Handbook.[205] The Military Advocate-General pointed to the fact that there is a lack of clarity with regard to the accepted norm in customary international law in this context. As stated above, the Commentary on the San Remo Manual cannot assist in the interpretive process.[206] The Commentary on rule 148(b) of the Harvard Air and Missile Warfare Manual states that this requirement refers to a grace period during which neutral aircraft are allowed to leave the blockaded area.[207]

Restricting the blockade to a specific duration was regarded as impossible, in view of the open ended nature of the conflict with Hamas.[208] Even if we regard the 'duration' as an emerging rule of customary international law, great weight is not attached to establishing a specific term during which the blockade is required to run. Therefore, it appears that the notice that the naval blockade would continue 'until further notice' satisfies the legal requirements. This notification was also included in the periodic notices that were sent with regard to the existence of a naval blockade. At the crux of the notification provisions is the goal of ensuring that neutral ships are aware of the existence of a naval blockade

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199 *Defense Minister's Memorandum*, *supra* note 176, at 22.
200 Notice to mariners 1/2009 (Jan. 6, 2009).
201 *San Remo Manual*, *supra* note 110, at rule 94.
202 *The Air and Missile Warfare Manual*, *supra* note 115, at art. 148(b).
203 See *The UK Manual*, *supra* note 113, at 363, para. 13.66.
204 *The Canadian Manual*, *supra* note 113, at 8-11/8-12, para. 845.
205 See *U.S. Navy, The Commander's Handbook*, *supra* note 92, at 7-10, para. 7.7.2.2.
206 *San Remo Explanation*, *supra* note 110, at 177, para. 94.1.
207 *The Air and Missile Warfare Manual*, *supra* note 115, at 289, art. 148(b).
208 *Defense Minister's Open Door Testimony*, *supra* note 70, 3-5.

so that they can avoid entering the area. In the case at hand, the flotilla organizers' stated intention was to breach it and enter the Gaza Strip.[209]

60. Despite the aforesaid, one advantage of stipulating a specific duration is that it would ensure a systematic and periodic review of the blockade at the highest echelons of the Government, in order to examine whether there has been a change in circumstances and whether the naval blockade continues to achieve the anticipated effect. As noted, the lack of a specific duration of the blockade does not affect its legality, but stipulating a fixed duration would ensure that its effectiveness in achieving the Government's anticipated security purposes and its effect on the civilian population would come under review.

Humanitarian obligations

61. As stated above, one of the unique features of a naval blockade is that irrespective of the purpose for which the blockade is imposed, all neutral vessels breaching the blockade or attempting to breach the blockade must be stopped, whether they are carrying weapons or other supplies (commercial cargo, humanitarian equipment, etc.).[210] In order for the blockade to be regarded as binding, it must be effective, i.e., the entry of all vessels into the Gaza Strip must be prevented *de facto*.[211] Israel satisfied these conditions. Once a blockade is established, it is likely to have a humanitarian impact on the civilian population in the blockaded area. The blockading party must therefore consider the humanitarian impact that the blockade will have on the civilian population of the territory.

The duty to consider the humanitarian impact of a naval blockade is stated in articles 102-104 of the San Remo Manual. Pursuant to these articles, the imposition of a naval blockade is prohibited if its sole purpose

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209 See Insani Yardim Vakfi, The Foundation for Human Rights and Freedoms and Humanitarian Relief (IHH), *Palestine Our Route Humanitarian Aid Our Load, Flotilla Campaign Summary Report* 20 [hereinafter *IHH Flotilla Campaign Summary*], *available at www.ihh.org.tr/insani-yardim-filosu-ozet-raporu/en/*. See also Protocol "Freedom Flotilla Coalition Meeting" (May 16, 2010), found on the computer of a journalist who participated in the flotilla on board the *Mavi Marmara*. The intention to breach the blockade was dispatched by the flotilla participants over the radio when the IDF Navy's forces halted the ships at the start of the enforcement operation. See also *IICC report* (Jan. 19, 2010), *supra* note 83, at 5; *IICC report* (Jan. 31, 2010), *Id.*, at 1; *IICC report* (Mar. 7, 2010), *Id.*, at 3; and appendix 39 to "Defense Minister's Memorandum - Appendices" (A Collection added to the Defense Minister's Memorandum, Aug. 30, 2010), marked by the Commission as exhibit 54 [hereinafter *Defense Minister's Memorandum - Appendices*].

210 Oppenheim, *supra* note 86, at 774-775.

211 *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 33.

is to starve the civilian population or deprive them of other objects essential for their survival (article 102(a)) or if the damage to the civilian population is excessive, or is expected to be excessive, in relation to the military advantage anticipated from the blockade (article 102(b)). Article 103 concerns the duty of the blockading party to provide the civilian population with food and other objects essential for its survival, subject to certain conditions. Article 104 provides that, subject to certain conditions, the blockading party should ensure the passage of medical supplies for the civilian population or for the wounded and sick members of the enemy forces. In the original language:

> '102. The declaration or establishment of a blockade is prohibited if:
>
> (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
>
> (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.
>
> 103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:
>
> (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
>
> (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.
>
> 104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.'

The analysis shall now turn to the question whether the naval blockade that Israel imposed on the Gaza Strip had a humanitarian impact on the civilian population in the Gaza Strip that rendered it contrary to international law.

62. One of the difficulties that presented itself before the Commission was that the witnesses testifying on this matter found it hard to identify the 'humanitarian' impact of the naval blockade on the population of the

Gaza Strip, as distinct from the impact of Israel's land crossings policy. The difficulty created by the attempt to assess the humanitarian impact of the naval blockade itself arises in part because of the fact that even before the naval blockade, there was no maritime trade via the coasts of the Gaza Strip since there was no suitable port, and in part because of the fact that before Israel imposed the land crossings policy (September 19, 2007), the international community only made limited attempts to bring goods into the Gaza Strip by sea. Admittedly, the absence of a commercial port is not a decisive factor, since it is clear that it is possible to find other ways of transporting goods arriving by sea, such as by means of unloading the goods with the help of fishing boats. Moreover, the assumption that goods cannot be transported into the Gaza Strip in the absence of a commercial port inherently contradicts the main purpose of the blockade, i.e., preventing the passage of weapons to the Gaza Strip, since, according to the same logic; it would not be at all possible to transport weapons to the Gaza Strip by sea.

Although the transport of goods via the sea appears to be a limited possibility in the Gaza Strip, in the absence of information and records in this regard, it is difficult to determine the effect of the naval blockade alone on the humanitarian situation in the Gaza Strip. It would appear that the flotilla organizers themselves sought to focus attention on the 'humanitarian' impact of the land crossings policy, and not especially on the issue of the naval blockade.[212] The reason why the issue arose from a maritime perspective was that the activists on the Flotilla were seeking to focus attention on the "humanitarian" impact of the land border policy by loading the vessels with medical and other supplies and seeking to breach the blockade, instead of using the land route. Access from the sea offered a unique opportunity to internationalize and publicize the broader Israeli policy of limiting access to Gaza. Access from the sea offered a unique opportunity to internationalize and publicize the broader Israeli policy of limiting access to Gaza. The goal of the Flotilla was obviously not just to breach the blockade, but also to bring international pressure to bear in a bid to end the land based restrictions.[213]

63. As noted above, it should be recalled that the naval blockade was not imposed in a vacuum. Both the naval blockade and the land crossings policy were imposed and implemented because of the prolonged

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212 *Defense Minister's Open Door Testimony*, *supra* note 70, at 23-25.

213 The large number of members of the media on board the Marmara strengthens this assumption; it seems that the primary goal was political and concentrated on creating a media event; See also: *Prime Minister's Open Door Testimony*, *supra* note 82, at 8; *Military Advocate-General's testimony*, *supra* note 98, at 65.

international armed conflict between Israel and the Hamas. As noted, on the strategic level - even though this may not have been the primary purpose underlying the imposition of the naval blockade - the naval blockade is regarded by the Government as a part of Israel's wider effort not to give legitimacy to the Hamas's rule over the Gaza Strip, to isolate it in the international arena, and to strengthen the Palestinian Authority.[214] In this context, the leader of the opposition, Tzipi Livni testified before the Commission:

> 'On a practical level, even if not conceptually, on a practical level, when problems of this kind arise, I remember those times that we offered to transport the goods for them by land. And therefore the story is not whether it is possible to transport goods and whether for this purpose we are breaking the blockade, but a field that is a different field altogether, which is really a security field, and it is also diplomatic and political and another framework altogether.'[215]

The naval blockade is also connected to the land crossings policy on a tactical level. Because of the considerable difficulty of examining cargo on the high seas, the land border crossings provide a more controlled environment for the passage of humanitarian supplies.[216] Nonetheless, when vessels are directed for military-tactical reasons to Ashdod port, in practice, the transport of the goods on board is subject to the land crossings policy. Therefore, despite the circumstances described above, it is possible that the enforcement of the naval blockade in addition to the implementation of the land crossings policy has a humanitarian impact on the population, at least in principle. In other words, as long as the land crossings are subject to Israeli control, there is *prima facie* a possibility that the opening of an additional route to the Gaza Strip, such as a maritime route that is not controlled by the State of Israel, will affect the humanitarian situation in the Gaza Strip.

Thus, in the present case, some of the flotilla vessels carried iron and cement; materials that have been defined by Israel as materials that can be used for military purposes because of the extensive use made by the Hamas of these materials in order to fortify buildings and tunnels

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214 *Leader of the Opposition Tzipi Livni's open door testimony*, *supra* note 177, at 13-15

215 *Id.*, at 18.

216 Already in the Notice to Mariners from 2008 (which was issued prior to the establishment of the blockade), it was specifically mentioned that humanitarian equipment would be transferred through the land crossings. Likewise, in relation to this flotilla, the Israeli authorities offered the flotilla participants to change the direction towards the port of Ashdod and transfer the humanitarian supplies on board to the Gaza Strip through the land crossings).

in the Gaza Strip.[217] Therefore, the Israeli Government has allowed the supply of building materials, including cement and iron, through the land border crossings only for projects approved by Israel and on the condition that their entry is coordinated in advance with international agencies operating in the Gaza Strip.[218] By contrast, the representatives of human rights organizations that testified before the Commission emphasized the need to bring building materials into the Gaza Strip, in order to allow for housing and reconstruction in the wake of Operation Cast Lead.[219] According to the flotilla organizers, their decision to try and transport such materials by sea arose from their view that these materials, which they claim are required by the civilian population in the Gaza Strip, will not be permitted to pass by the land border crossings.[220] The approach of the Israeli Government therefore created, in this sense, a connection regarding the humanitarian effect on the Gaza Strip between the naval blockade and the land crossings policy.

64. Before assessing the humanitarian situation in the Gaza Strip, the analysis will briefly consider a preliminary question: does the fact that Israel is not in control of the southern border between the Gaza Strip and Egypt (i.e., the Rafah crossing) affect Israel's responsibility for the humanitarian situation in the Gaza Strip? The Commission has reached the conclusion that the answer to this question is no, for two reasons. First, even if the land crossing into Egypt was open (which was indeed the case at times), Israel would still be obliged, as the party that imposed the naval blockade, to examine the humanitarian situation in Gaza. Second, Egypt did indeed impose restrictions on movement at the Rafah crossing

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217 For a list of materials found on board the flotilla's ships See: "Civilian Policy regarding Gaza Strip - *Regarding the Claims of Human Rights Organizations*" (Oct. 31, 2010), at 27, marked by the Commission as exhibit 127 [hereinafter *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations*, *Dated 31.10.2010*]; *IICC report* (Jun. 14, 2010), *supra* note 83.

218 *Id.*, at 27-28. For the current list of items which could serve both military purposes and non-military purposes and whose entrance into the Gaza Strip is not permitted; see: Israel Ministry of Foreign Cases: Gaza - Lists of Controlled Entry Item, *available at* www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Lists_Controlled_Entry_Items_4-Jul-2010.htm (2010).

219 *Fact Sheet: United Nations Humanitarian Country Team Advocacy Event on the Gaza Strip's Agricultural Sector*, *available at* www.ochaopt.org/documents/gaza_agriculture_25_05_2010_fact_sheet_english.pdf (2010) [hereinafter *Fact Sheet*];

220 *United Nations: 2010 Consolidated Appeal: Occupied Palestinian Territory*, *available at* http://ochaonline.un.org/humanitarianappeal/webpage.asp?Page=1823 (2009), at 53 [hereinafter *Consolidated Appeal*];
United Nations Relief and Works Agency (UNRWA): Emergency Operations in Gaza, *Interim Progress Report January-March 2009*, *available at* www.unrwa.org/userfiles/20100119593.pdf (2009), at 10 [hereinafter *Emergency Operations*].
IHH Flotilla Campaign Summary, *supra* note 209, at 10.

during the relevant time period. Given the legal requirement to consider the impact of the naval blockade on the humanitarian situation in Gaza, the analysis will now turn to that issue.

The humanitarian situation in the Gaza Strip

Background

65. The examination of the humanitarian situation in the Gaza Strip must be carried out in the context of the general framework of this discussion. As noted above, from the time that Israel took control over the Gaza Strip until 1981, Israel supplied all the civilian needs of the Gaza Strip through the military administration. In 1981, the civilian administration was established, which supplied the needs of the Gaza Strip until the Gaza-Jericho Agreement was signed in 1994. From this stage onward until the implementation of the disengagement plan in 2005, Israel's role was diminished and mainly included aid, coordination, and carrying out liaison operations with the Palestinian Authority. In 2005, when the military administration in the Gaza Strip was cancelled and the IDF left the territory, the need to continue to coordinate Government operations regarding the Gaza Strip remained, especially with regard to the activity of the land crossings between Israel and the Gaza Strip, which Israel continues to control.[221]

66. The Israeli entity responsible for coordinating with the Gaza Strip and the West Bank is called the 'Coordination of Government Activities in the Territories' (COGAT), which is headed by the Coordinator of Government Activities in the Territories, an officer with the rank of Major-General, who is directly subordinate to the Minister of Defense and at the same time is a member of the General Staff of the IDF. The branch of COGAT that deals with the Gaza Strip is the District Coordination and Liaison Office for the Gaza Strip (Gaza Strip DCO), which is headed by an officer with the rank of Colonel. The Gaza Strip DCO coordinates the activity with the Palestinian Authority, and it also advises IDF commanders in the field (headed by the Southern District Commander and the Gaza Division Commander) with regard to civilian and humanitarian issues in the Gaza Strip.

According to testimony of the Coordinator of Government Activities in the Territories, Major-General Eitan Dangot, it appears that COGAT's mission regarding the Gaza Strip is: (1) 'leading and implementing the civilian policy… in the changing reality, in coordination and cooperation

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221 *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 6-7.

with the IDF, the security establishment and Government ministries; (2) formulating and implementing contacts with the Palestinian Authority, civilian organizations and the international community…'.[222] The Coordinator of Government Activities in the Territories also stated that at the beginning of 2010, COGAT defined two particular goals for the coming two years: formulating an assessment of the civilian situation in the Palestinian sphere while identifying and analyzing trends and processes, and, with regards to the Gaza Strip, of 'planning and realizing the humanitarian effort and assistance to the population, while integrating them into the campaign to weaken Hamas.'[223]

Today, three land crossings between Israel and the Gaza Strip are active: the Kerem Shalom crossing, which is used, *inter alia*, as the official crossing for fuel into the Gaza Strip; the Erez crossing, which is used for the movement of people; and the Karni crossing, which is used for transporting seeded food and aggregates, and whose operation is assessed each day according to security considerations.[224] All of the crossings are operated by the Land Crossings Authority at the Ministry of Defense and in coordination between the Gaza Strip DCO and the Palestinian Crossings Administration, which is subordinate to the Palestinian Prime Minister, Salam Fayyad.[225]

Israel's border crossings policy September 19, 2007- June 10, 2009

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222 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 2-3; the third designation - to constitute a civilian authority for the Israeli settlement in the West Bank in the fields of planning and infrastructure - is irrelevant to the Gaza Strip following the Disengagement.

223 *Id.*, at 4.

224 Over the years, border crossings Sufa and Nahal Oz also operated between Israel and the Gaza Strip. The Sufa crossing served as a temporary alternative passage following the closure of the Karni crossing in 2007 (in light of the difficult security situation in the area; the risk of operating the crossing; and the lack of a coordination entity on the Palestinian side). In August 2008, this crossing was closed and the activity was transferred to the Kerem Shalom crossing. The Gas terminal at Nahal Oz was targeted in a number of terrorist attacks, including the killing of two Israeli civilians who worked at the terminal on Apr. 9, 2008, as well as the firing of rockets and mortar shells and an attempt to dig a tunnel and plant explosives under the passage; it was therefore decided to shut it down. It should also be mentioned that the other crossings were also targeted by terrorist attacks, including a combined attack at Karni crossing on Jan. 13, 2005 where an explosive charge detonated at the crossing and three terrorists burst into the crossing and killed six Israeli civilians. On Apr. 19, 2008, Passover eve, an attack took place on the Kerem Shalom crossing, backed by mortar shells, an armored vehicle and two cars packed with explosives disguised to look like IDF jeeps. In this attack, 13 soldiers were injured and the crossing had to be shut down for repairs (estimated at ten million shekels); See *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 35-40.

225 *Id.*

67. As stated above, in 2007 there was a change in Israel's policy towards the Gaza Strip. As a result of the Hamas takeover of the Gaza Strip, the Ministerial National Security Committee decided to impose civilian restrictions on the Gaza Strip, including a restriction on the transfer of goods; a reduction in the supply of fuel and electricity; and a restriction on the movement of persons in and out of the Gaza Strip, after a legal examination of the issue and with the intention of preventing a humanitarian crisis in the Gaza Strip.[226] On June 10, 2009, the Ministerial Committee further decided that the activity of the crossings would be determined, *inter alia*, by the basic needs of the Palestinian population, and control was introduced with regard to the transfer of money to the Gaza Strip (hereafter, jointly: **the land crossings policy**). As evidenced by the testimonies that the Commission heard, the land crossings policy sought to achieve two goals: a security goal of preventing the entry of weapons, ammunition and military supplies into the Gaza Strip in order to reduce the Hamas' attacks on Israel and its citizens, and a broader strategic goal of 'indirect economic warfare,' whose purpose is to restrict the Hamas' economic ability as the body in control of the Gaza Strip to take military action against Israel.[227] This is not a unique circumstance; as has been noted historically, 'the two forms tend [military and economic] to run into each other.'[228]

It should be noted that pursuant to the aforesaid resolutions, there is no contact between Israel and the Hamas government in the Gaza Strip, and any communication with the Gaza Strip is carried out through representatives of the Palestinian Authority (the government of Salam Fayyad) or through international organizations.[229] The actual implementation of the policy is carried out by COGAT.[230] We shall discuss the principles that COGAT follows in implementing the policy and its actual implementation below.

68. In order to complete the picture it should be noted that the land crossings policy was altered in June 2010. In the relevant resolution, it was stated that several steps would be taken without delay, including

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226 *Id.*, at 10-11; See also *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 37.

227 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 51; on this matter see also Jeremy Matam Farrall, United Nations Sanctions and the Rule of Law 107 (2007).

228 See Colombos, The International Law of the Sea, *supra* note 94, at 716-717.

229 The Government Activity Coordinator in the Territories has contact with approximately 160 international organizations on matters regarding the Gaza Strip; See *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 14.

230 *Id.*, at 17.

the publication of a list of items prohibited from entering the Gaza Strip that would include 'only weapons, military equipment and problematic dual-purpose items.' Any item that does not appear on the aforesaid list, according to the resolution, will be permitted to enter. An additional change in this policy was made on December 8, 2010, when it was resolved that, subject to certain restrictions, approval would be given to a gradual policy for sending goods from the Gaza Strip outside the borders of Israel and to the West Bank.[231] Notwithstanding these recent alterations, below we shall consider the land crossings policy that was in force in May 2010.

Claims regarding the humanitarian situation in the Gaza Strip

69. The evidence that the Commission took into consideration when assessing the impact of the land crossings policy on the civilian population in the Gaza Strip were the testimony of the Coordinator of Government Activities in the Territories, the testimonies of human rights organizations, and reports of human rights and humanitarian organizations that operate in the Gaza Strip. In this context, it should be noted that assessing the effectiveness and humanitarian consequences of economic sanctions can be challenging because of the difficulty in separating the effects of sanctions from other causes of political and social disruption. While this does not mean that tracing the influence of sanctions is impossible "it does suggest the need for humility and caution in drawing conclusions about sanctions effects."[232] At the same time, great care should be taken when analyzing the humanitarian situation in territories where the humanitarian situation was poor from the outset because '… countries already on the verge of humanitarian crisis clearly are more likely to be pushed over the edge by effectively imposed economic sanctions.'[233]

70. It is therefore important to bear in mind the position that prevailed in the Gaza Strip before this policy was adopted. From a publication of the World Bank of June 23, 2004, it would appear that the poverty level in the Gaza Strip has steadily increased. In 1998, the level was 21,6%,

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231 See decision no. B/64 of the Ministerial National Security Committee (the Political-Security Cabinet) of December 8, 2010.

232 David Cortright and George A. Lopez, The Sanctions Decade: Assessing UN Strategies in the 1990s 213 (2000).

233 *Id.*

rising to nearly 35% in 2006.[234] In 2003, the unemployment level was 29%.[235] Sanitary conditions in Gaza were assessed as 'very poor.'[236]

71. As for the humanitarian situation prevailing in the Gaza Strip since the establishment of the land crossings policy in September 2007, the evidence brought before the Commission and additional material examined by the Commission of its own initiative seemed at times to present two very different perceptions of reality. Human rights and humanitarian organizations presented (before the Commission and in other forums) a position that there is a real humanitarian crisis in the Gaza Strip.[237] By contrast, Israeli government officials were unanimously clear in their assessment that there was no "humanitarian crisis" in Gaza.[238] *Prima facie*, it is difficult to reconcile the view of the humanitarian situation presented by human rights organizations with that of the Israeli government. However, the Committee will provide a brief overview of some of the main areas that require further examination - which appears to be food, health care, medical supplies, electricity, fuel, water, sanitation, and livelihood - in order to clarify and illuminate the two positions.

72. According to reports of human rights and humanitarian organizations report that 60.5% of households suffer from 'food insecurity.'[239] Food insecurity is defined as a situation in which 'people

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234 *The World Bank: West Bank and Gaza: Economic Developments and Prospects - March 2008*, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/WESTBANKGAZAEXTN/0,,contentMDK:21694302~menuPK:294370~pagePK:2865066~piPK:2865079~theSitePK:294365,00.html (2008).

235 *Id*.

236 *ICRC: Gaza Closure: Not Another Year*, *available at* www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-update-140610 (2010) [hereinafter *Gaza Closure*].

237 *Consolidated Appeal*, *supra* note 219, at 9 (which relates to the situation in Gaza as a crisis of "Human Dignity");
UNRWA: *Emergency Appeal 2010*, 9, *available at* www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/VVOS-7ZUU59-full_report.pdf/$File/full_report.pdf (2010), 6 [hereinafter *Protracted Socioeconomic Crisis*];
United Nations, Office for the Coordination of Humanitarian Cases (OCHA): *Occupied Palestinian Territory, The Humanitarian Monitor*, *available at* www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2010_06_21_english.pdf (2010) [hereinafter *Serious Crisis of Human Dignity*];
See also *Gaza Closure*, *supra* note 236, and *Fact Sheet*, *supra* note 219.

238 *Prime Minister's Open Door Testimony*, *supra* note 82, at 8; *Military Advocate-General's testimony*, *supra* note 98, at 57; *Open Door Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 60; *Defense Minister's Open Door Testimony*, *supra* note 70, at 24; *Leader of the Opposition Tzipi Livni's open door testimony*, *supra* note 177, at 31.

239 See *Consolidated Appeal*, *supra* note 219, at 2, 23.
The matter may actually reflect a certain improvement as compared to previous years, with the report showing that 75% of Gaza's population suffered from food insecurity following Israel's attack as part of Operation "Cast Lead", however; it still presents a high level of food insecurity. See *OCHA: Locked In: The Humanitarian Impact of Two Years of*

lack sustainable physical or economic access to adequate safe, nutritious and socially acceptable food to maintain a healthy and productive life.'[240] This situation is described as a result of 'food price inflation, poverty, livelihoods' deterioration and erosion of coping mechanisms, leading to increased difficulties of households to afford sufficient quantities of quality food.'[241]

These organizations also claim that the health care system in the Gaza Strip is deteriorating. Stocks of essential medical supplies have reached an all-time low.[242] The restrictions imposed on persons passing through the land border crossings affects patients that require medical treatment outside the Gaza Strip, the major impediment being lack of response by Israeli authorities to applications for permit by the time of the scheduled appointment.[243] According to the testimony of Physicians for Human Rights (a non-governmental organization, which advocates for human rights in general and for the right to health in particular, in Israel and in the territories), approximately 30 per cent of applications for permits are rejected or delayed.[244] With regard to the supply of electricity to the Gaza Strip, these organizations said that the demand at 240-280 Megawatts, is not being met. As a result, the population in the Gaza Strip experiences prolonged electricity outages of an average of seven hours a day. These outages have devastating effects on the health system, which now relies on generators for which fuel reserves are not easily accessible.[245]

As stated by various organizations, during the Operation Cast Lead, approximately 3,500 houses in the Gaza Strip were completely destroyed, and approximately 2,800 houses were significantly damaged.[246] The prohibition imposed by Israel on the entry of building materials prevents the building and reconstruction of residential houses, schools, medical facilities and public infrastructures. Moreover, only approximately 60% of

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Blockade on the Gaza Strip, *available at* www.ochaopt.org/documents/Ocha_opt_Gaza_impact_of_two_years_of_blockade_August_2009_english.pdf (2009) [hereinafter *Special Focus*].

240 *Special Focus*, *supra* note 239, at 9.

241 See *Consolidated Appeal*, *supra* note 219, at 23.

242 See *Gaza Closure*, *supra* note 236.

243 *UNRWA: Updated Quick Response Plan for Gaza: An Assessment of Needs Six Months after the War*, *available at* www.unrwa.org/userfiles/20100119144213.pdf (2010), at 26 [hereinafter *Quick Response Plan for Gaza*].

244 Transcript of session no. 4 "Testimony of Physicians for Human Rights Representatives" (Professor Tzvi Bentowitz, Ran Yeron & Dr. Moustafa Yasin) (Oct. 13, 2010), at 8 [hereinafter *Testimony of Physicians for Human Rights*].

245 *Special Focus*, *supra* note 239, at 3.

246 See *Consolidated Appeal*, *supra* note 219, at 15; *Special Focus*, *supra* note 239, at 3.

the population of the Gaza Strip is connected to the sewage system,[247] and 90% of the water supplied to the inhabitants of the Gaza Strip is unsafe for drinking according to the standards of the World Health Organization.[248]

According to various reports, more than a million people live on humanitarian aid provided by various humanitarian organizations in the Gaza Strip.[249] Various human rights and humanitarian organizations estimate that the prohibition on exports imposed by Israel, in addition to the severe restrictions on imports, has *de facto* paralyzed the private sector.[250] These organizations therefore conclude that the collapse of the economy of the Gaza Strip derives from the naval blockade imposed by Israel and its land crossings policy.[251] However, it should be noted that even though the various humanitarian organizations criticize the imposition of the naval blockade in January 2009, in reality, the imposition and the enforcement of the blockade drew only little attention prior to the event of May 31, 2010.

73. By contrast, the Coordinator of Government Activities in the Territories, in a testimony that was supported by a significant number of documents, explained how Israel *de facto* implements its land crossings policy in the four areas identified in the Government resolution: entry and exit of goods from the Gaza Strip, movement of persons, electricity and fuel, and monetary activity. The Coordinator of Government Activities in the Territories also addressed specific claims that were raised before the Commission by the testifying human rights organizations.

The entry and exit of goods from the Gaza Strip. The Coordinator of Government Activities in the Territories testified before the Commission that the implementation of the Government's policy in this field is guided by dual considerations: to implement the restrictions determined in the Government's resolutions and to transfer the goods necessary to meet the needs of the civilian population.[252] The Coordinator of Government Activities in the Territories clarified that all the goods entering the Gaza Strip are financed by the Palestinian Authority, merchants on market terms, or by international organizations; not by Israel.[253] Israel

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247 See *Gaza Closure*, *supra* note 236.

248 *Gisha: Red Lines Crossed: Destruction of Gaza's Infrastructure*, *available at* www.gisha.org/UserFiles/File/publications_/Infrastructure_Report_Aug09_Eng.pdf (2009) [hereinafter *Red Lines Crossed*].

249 *Special Focus*, *supra* note 239, at 10.

250 *Quick Response Plan for Gaza*, *supra* note 243, at 7.

251 *Id.*, at 22.

252 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 77.

253 *Id.*, at 10-11.

is merely the party that coordinates and oversees the passage of goods in and out of the Gaza Strip. The Coordinator of Government Activities in the Territories went on to describe in detail the mechanism whereby this process operates as follows: the requests to bring goods into the Gaza Strip are received by the DCO from four parties. The Gaza Strip Economic Committee (a representation of the Palestinian Authority) is the main Palestinian party from which requests are received for entry of goods. This committee receives requests from private market forces and importers in the Gaza Strip. The requests need to include all of the relevant details, including the parties supplying the foods and details of the carriers. Ordering the goods and determining priorities between the various parties requesting the entry of goods is done by representatives of the Palestinian Authority in the Gaza Strip. This list is delivered each day from the Gaza Strip DCO to the head of the Economy Division (an officer with the rank of Lieutenant-Colonel), which examines the requests in accordance with the civilian policy as stated above. Persons in the Gaza Strip DCO only intervene in this internal order of priorities when according to their judgment there is a shortage of certain products in the Gaza Strip. In addition, the DCO receives requests from official bodies in the Gaza Strip, including the Palestinian Ministry of Agriculture in the Gaza Strip and the Palestinian Authority's water and electricity authorities. Other entities that submit requests to the DCO to bring goods into the Gaza Strip are international organizations.

The entry of goods is subject to the crossings' capacity. Between the various requests, the order of priorities for the entry of goods is determined as follows: (1) medical supplies and medicine; (2) requests by international organizations - humanitarian aid and supplies for approved projects; (3) agricultural materials; (4) the balance of supply capacity for the private market, according to the order of priorities determined by the Palestinians. After agreeing upon the list, the parties in the Gaza Strip DCO coordinate the actual entry of the goods with international bodies, the Palestinians, and the Land Crossings Authority of the Ministry of Defense. Implementation reports are distributed with a summary for each day, week, and month to all of the security authorities and the international community.[254]

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254 *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 17-18. Examples of said reports were transferred to the Commission, marked as exhibit 111-112 of the Commission's exhibits. As a rule, the daily reports include reference to the transfer of goods and fuel to the Gaza Strip; the crossings through which these goods passed; and the type of goods and fuel brought into the Gaza Strip according to the number of trucks (or tankers, as the case may be) and in metric tons.

In practice, there is a restriction on the *variety* of products that can be brought into the Gaza Strip, in the form of the 'list of humanitarian products approved for entry into the Gaza Strip.'[255] With regard to the restriction on the *quantity* of goods entering the Gaza Strip via the land crossings, the material submitted by COGAT states that apart from a restriction deriving from the capacity of the crossings and a quota for the entry of fuel (which was approved by the Supreme Court)[256] and a quota for the entry of agricultural products,[257] there is no quota limiting the amounts of foods that are allowed to enter the Gaza Strip. Notwithstanding, it should be stated that from the material submitted to the Commission by COGAT, it is evident that at least during certain periods there was a restriction on the number of trucks permitted to enter at the crossings each day / week for products that do not fall within the scope of agricultural products or fuel.[258] In addition, the Coordinator of Government Activities in the Territories added that, in general, the flow of goods at the land crossings is stable and permanent, but sometimes Israel is compelled to close the land crossings because of direct shooting attacks of rockets that are fired at them by Hamas. In such situations, the activity at the crossings usually decreases for several days, but usually returns thereafter to its previous level.

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255 See *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010*, *supra* note 217, at appendix A (marked as a draft but according to his statement served as an obligating order); from the document it is evident that the guidelines for the inclusion of a specific product in the list of products authorized to enter the Gaza Strip are: necessity of the product for meeting humanitarian needs, including implications on public health (in the Gaza Strip and in Israel); "the imagistic perception [thus in original] of the product" (that is, whether the product is considered to be a luxury item); legal/judicial obligation to permit the entrance of the product; "implications of the product's uses (will it be used for conservation, rebuilding, or development) while stressing the influence of its entrance on the status of the Hamas regime"; security implications (can the product be used for military purposes); sensitivity to the needs of the international community; the existence of alternatives.

256 *Al-Bassiouni* case, *supra* note 140, at paras. 17-21.

257 *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 14; 22 trucks a day which was expanded to 26 trucks a day, though it was mentioned that this is not a strict limit. Likewise it was mentioned that this cap does not apply to agricultural produce transferred from the West Bank to the Gaza Strip in coordination with the Economic committee in the strip. From the material submitted by the Government Activity Coordinator in the Territories, it can be seen that following the government's decision of 18.3.2009 the average daily number of trucks entering the strip rose to 71 double food trucks, as compared to 67 trucks (not all of them double) previously; at the same time it should be stressed that this data refers to the total food and agricultural products entering the Gaza Strip and not just the agricultural produce and input.

258 *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010*, *supra* note 217, at Appendix A. thus for example it arises from the material that on 30.5.2010 there was a quantitative cap on the number of trucks carrying clothing and shoes allowed to pass through the land crossings.

The Coordinator of Government Activities in the Territories made clear in his testimony that after the disengagement, the State of Israel is unable to monitor the destinations of the goods inside the Gaza Strip, since Israel has no physical presence in the territory itself.[259] However, he explained that COGAT monitors the situation with all of the means at its disposal in order to ensure that the policy does not lead to a humanitarian crisis in the Gaza Strip. For instance, COGAT makes use of situation assessments and periodic forums with Palestinian Authority authorities in the Gaza Strip, with Israeli Government ministries and the international community (such as UN agencies, the Secretary-General's Special Coordinator for the Middle East Peace Process, diplomatic representations, representatives of the Quartet, representatives of the European Union, the Red Cross, non-governmental organizations and human rights organizations), information that is received from the Palestinian media, etc. During the second half of 2008, COGAT formulated a support model for building up a situation picture, which is known as a 'Supply Assessment;' an economic model expressed in a formula that is supposed to help calculate the 'supply level' of various products (i.e., for how many days the amount of supplies currently present in the Gaza Strip will last). The premise is that at any given moment there should be a certain 'supply level' for each of the products whose entry is permitted. When the supply level for a certain product falls below a set minimum, procedures are put into operation in order to verify the figures; produce a daily supply assessment report until the supply is stabilized; and a plan is developed for 'increasing the entry of the relevant product, unless there is a deliberate restriction policy.' It was determined that in such a case, the implications of the shortage of the relevant product should be presented to the decision-makers.[260] The model itself is based on figures of the goods transported via the land crossings and information about local crops, and it is calculated each week for food products, animal feeds, and fuel. The economic model is as follows:

- Daily consumption for the product per capita × size of the population = estimated daily consumption for the Gaza Strip
- Estimated supply in the Gaza Strip on day X + amount that entered via crossings + [additional figures] - estimated daily consumption = supply assessment
- Supply / estimated daily consumption = supply level

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259 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 31.

260 *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010*, *supra* note 217.

The Coordinator of Government Activities in the Territories emphasized that this is merely a support model for carrying out the monitoring process, and not a model for determining what enters the Gaza Strip on a day to day basis.[261]

Regarding the aforementioned claims of food insecurity in the Gaza Strip, the Coordinator of Government Activities in the Territories said that in most cases the requests sent by the Palestinian Authority correspond with COGAT's assessments regarding the population's needs.[262] Despite this, there is a large disparity between the information provided by the humanitarian organizations at work meetings regarding the coordination of aid to the Gaza Strip and their subsequent declarations to the media.[263] The Coordinator of Government Activities in the Territories particularly pointed out that a significant amount of consumption in the Gaza Strip is based on the supply of crops grown in the Gaza Strip itself, and Israel's land crossings policy has no effect on the consumption of these crops.[264] The Coordinator of Government Activities in the Territories repeatedly and clearly stated that there is no starvation in the Gaza Strip. With regard to medicine and medical supplies, he reemphasized that there is no disparity between the requests received from the Palestinian Authority and the products approved for entry into the Gaza Strip, except for medical supplies that also have military uses (such as radiation devices). The entry of these supplies is subject to a special system of approval before they are brought into the Gaza Strip.[265]

Movement of persons. The established principles permit movement between Israel and the Gaza Strip only in exceptional humanitarian cases, with an emphasis on urgent medical cases. Each request in this regard is examined on its merits.[266] According to the Coordinator of Government Activities in the Territories, four out of every five requests to receive permits for medical treatment outside the Gaza Strip are granted.[267] When such an application is refused, the reason is usually that the applicant has a security background that does not allow them to enter Israel or that the Palestinian Authority, for its own reasons, prefers that person to receive treatment in Gaza or Egypt.[268]

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261 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 30.
262 *Id.*, at 42-43.
263 *Id.*, at 23.
264 *Id.*, at 103.
265 *Id.*, at 105-106.
266 *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 20.
267 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 83.
268 *Id.*, at 82

Electricity and fuel. The principles determined for the entry of fuel and electricity, which were reviewed by the Supreme Court in *Al-Bassiouni v. Prime Minister*,[269] include the imposition of restrictions on the supply of fuel and electricity, without harming the humanitarian needs of the population. The Coordinator of Government Activities in the Territories explained that the supply of electricity in the Gaza Strip comes from three sources: Israel, Egypt and the power station in Gaza. In the context of implementing the land crossings policy, it was resolved to maintain the electricity supply capacity to the Gaza Strip as it was prior to the resolution of the Ministerial Security Committee of September 19, 2007,[270] and not to restrict the actual supply of electricity via the power lines. Likewise, it was decided to maintain the supply capacity of the power station in the Gaza Strip by allowing in a sufficient quantity of fuel to exhaust the station's full capacity of electricity production and to determine quotas of fuel that would meet the humanitarian needs of the population (as stated in *Al-Bassiouni v. Prime Minister*).[271] Moreover, as the Coordinator of Government Activities in the Territories said, in practice, Israeli authorities are not involved at all in fuel orders since these are made directly between the Palestinian Authority and the Israeli fuel companies. The restrictions on bringing fuel into the Gaza Strip that were mentioned in the testimonies of the human rights organizations were restrictions imposed by the Palestinian Authority in order to receive reimbursement from the Hamas.[272] Thus, for example, COGAT noticed at the end of 2009 that the supply of diesel to the power station in the Gaza Strip had decreased to an extent that could cause a reduction in the supply of electricity to the Gaza Strip. When COGAT contacted the Palestinian Authority in this regard, it was told that Hamas had not sent the tax payments that it collected for the use of electricity and, therefore, the Palestinian Authority decided to reduce the electricity supply.[273]

Monetary activity. The Coordinator of Government Activities in the Territories testified that because of the concern that considerable amounts of money brought into the Gaza Strip are used for terrorism, the banks in Israel have suspended their working relationship with the banks in the Gaza Strip. Therefore, it was resolved that until a suitable alternative that complies with international standards can be found, the Bank of Israel will be the party that assists in realizing monetary activity. Israel allows

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269 *Al-Bassiouni* case, *supra* note 140, at paras. 17-21.
270 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 112.
271 *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 22.
272 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 113.
273 *Id.*, at 55.

a fixed amount of money into the Gaza Strip each month to pay salaries to the employees of the Palestinian Authority; to pay the salaries and ongoing expenses of international organizations (UNRWA and the Red Cross[274]) at their request; and to take money out of the Gaza Strip at the request of the Palestinian Authority (surplus cash that accumulates in the bank deposit boxes and/or replacements for worn out bills). In addition, any other individual request received from the Palestinian Authority is reviewed by COGAT.[275]

The Coordinator of Government Activities in the Territories also addressed additional issues that the crossings policy is claimed to affect. As he confirmed, the water situation in Gaza has been bad for years, but according to him, the poor water quality is the result of thousands of wells that have been illegally drilled.[276] He emphasized that Israel has not refused to transfer equipment for projects relating to the maintenance of the water system. Israel supplies hypochlorite to purify drinking water and several projects to improve the sewage infrastructure are also underway.[277] Moreover, before Hamas took control of the Gaza Strip, Israel coordinated with the United Nations and the Palestinian Authority the advancement of several housing projects in the Gaza Strip, but these projects were stopped because of the increase in the number of missile attacks and hostilities.[278] The Coordinator of Government Activities in the Territories explained that Hamas is the entity that is responsible for the economic situation in the Gaza Strip, because it chose the path of terrorism that prevents the development of economic relations, such as those that Israel has with the Palestinian Authority.[279]

74. In sum, the main disagreement between Israel and the human rights and humanitarian organizations is not whether the land crossings policy (and, as explained above, indirectly the naval blockade) impacts on the population of the Gaza Strip since Israel recognizes the fact that its policy has an effect on the civilian population in Gaza. The disagreement concerns the question whether the rules of international humanitarian law have been violated. Various human rights and humanitarian organizations argue that Israel has violated the rules of international humanitarian law,

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274 It should be mentioned that according to the material submitted by the Government Activity Coordinator in the Territories since May 2009 the Red Cross did not request the entrance of funds into the Gaza Strip for its activity. See *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 25.

275 *Id.*, at 23-25.

276 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 108.

277 *Id.*, at 104.

278 *Id.*

279 *Id.*, at 59, 71.

whereas Israel holds the position that it is acting in accordance with the rules of international law and that it, in fact, has taken exceptional steps in order to comply with these obligations. Therefore, the analysis will now turn to consider the question whether international humanitarian law has been violated.

The prohibition of starving the civilian population

75. As stated above, article 102(a) of the San Remo Manual prohibits the imposition of a naval blockade if its sole purpose is to starve the civilian population or prevent the supply of other objects essential for its survival. This rule of customary international law is also reflected in the military manuals of several countries,[280] and in legal[281] and academic[282] literature. Another customary rule that imposes a prohibition on starvation is found in article 54(1) of the First Additional Protocol to the Geneva Convention, which provides that 'Starvation of civilians as a method of warfare is prohibited.' This rule applies to operations on land as well as those at sea. However, in respect of starvation, the wording in Rule 102(a) is more limited in scope than the general prohibition reflected in article 54(1). *Prima facie*, one might conclude that as long as starvation is the consequence of a naval blockade but not its sole purpose, then it is not prohibited pursuant to international humanitarian law. However, insofar as a civilian population is actually starved as a result of a naval blockade, the party imposing the blockade is required to consider this result in the proportionality analysis required by article 102(b) of the San Remo Manual.[283] It should also be noted that the Harvard Air and Missile Warfare Manual recently proposed slightly amending the wording of article 102(a), so that the imposition of a naval blockade will be prohibited if the starvation of the civilian population is its sole or 'main' purpose.[284]

76. There is no formal definition of the concept of 'starvation' in international humanitarian law. However, the term 'causing starvation' should not be understood to simply cause hunger. The Commentary on article 54(1) of the First Additional Protocol states that the use of starvation as a means of warfare implies '… to provoke it deliberately, causing the

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280 See *U.S. Navy, The Commander's Handbook*, *supra* note 92, at paras. 7.7.2.5; *The UK Manual*, *supra* note 113, at 64, para. 13.74; *The Canadian Manual*, *supra* note 113, at 8-12, para. (a)(1)850; *The German Manual*, *supra* note 113, at 470, para. 1051.

281 *Heintschel von Heinegg*, Int'l L. Stud, *supra* note 85, at 217.

282 Dinstein, The Conduct of hostilities, *supra* note 86, at 137-138, *International Humanitarian Law Handbook*, *supra* note 113, at 470-471 and Green, The Contemporary Law of Armed Conflict, *supra* note 114.

283 See paras. 87-97 below.

284 *The Air and Missile Warfare Manual*, *supra* note 115, at 296, art. 157(a).

population to suffer hunger, particularly by depriving it of its sources of food or of supplies' and that '… starvation is referred to here as a method of warfare, i.e., as a weapon to annihilate or weaken the population.'[285] The Commission found no evidence in the considerable amount of material that was submitted to it, including the material submitted by human rights organizations, to the effect that Israel is trying to deprive the population of the Gaza Strip of food or to annihilate or weaken the population by means of starvation.

It is important to emphasize that humanitarian and human rights organizations themselves describe the situation in the Gaza Strip as a situation of 'food insecurity' (i.e., the lack of physical and economic access to sustainable food sources), and not as 'starvation' (a deliberate deprivation of food, which is intended to weaken or annihilate the population). Thus, the Coordinator of Government Activities in the Territories - the most senior official Israeli authority responsible for Israel's compliance with its humanitarian obligations vis-à-vis the Gaza Strip, who is in constant contact with the Palestinian Authority and the local and international humanitarian and human rights organizations operating in the Gaza Strip - also testified unequivocally before the Commission that no one has ever stated to him that the population of the Gaza Strip is 'starving.'[286] In a letter sent to the Commission on August 26, 2010, the organization Gisha stated that '[i]ndeed, it does appear that even during the flotilla events there was enough food in the Gaza Strip, but the continuing closure seriously impaired the economic ability of many people to purchase food products.'[287] The representatives of Gisha and Physicians for Human Rights confirmed in their testimonies before the Commission that during the relevant period, there was a sufficient quantity of food in the Gaza Strip, and that the problem was mainly economic, i.e., an inability of the population to purchase this food.[288]

77. There is no doubt that, economic warfare impacts on a blockaded population, and at least in theory has the potential to cause starvation. As article 103 of the San Remo Manual states, when the population does not receive an adequate supply of food and other objects essential

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285 See ICRC Commentary on Protocols Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims in Armed Conflicts (Protocol I), Jun. 8, 1977 [hereinafter *ICRC Commentary on Protocol I of the Geneva Conventions*], at paras. 2089, 2090.

286 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 59.

287 See letter from Gisha - Legal Center for Freedom of Movement to The Public Commission to Examine the Maritime Incident of May 31, 2010 (Aug. 26, 2010).

288 Transcript of session no. 12 "Testimony of Gisha Representatives" (Tamar Feldman & Sari Beshi) (Oct. 13, 2010), at 32 [hereinafter *Testimony of Gisha Representatives*]; *Testimony of Physicians for Human Rights*, *supra* note 244, at 3.

for its survival, a duty arises to provide the civilian population with aid consignments[289] (with regard to an occupied territory, an identical obligation is found in article 59 of the Fourth Geneva Convention).[290] As noted, Israel's position is that there is no intention to cause 'starvation' of the population of the Gaza Strip and it is making significant efforts in order to prevent it. The material before the Commission shows that the IDF is working in close collaboration with the Palestinian Authority, human rights organizations, and the international community in order to prevent this outcome.[291] The restrictions imposed by Israel considered this humanitarian obligation and were planned precisely in order to prevent a situation of 'starvation.' 'Food insecurity' does not equate to 'starvation.'

In sum, the steps taken in this regard by Israel are consistent with customary international law as provided in articles 102(a) and 103 of the San Remo Manual.

The provision of objects essential for the survival of the civilian population

78. The second obligation expressed in article 102 of the San Remo Manual is not to deprive the civilian population of 'objects essential for its survival.' Indeed, there is no exhaustive list of what constitutes objects essential for the population's survival, but various conventions state that this expression may include 'foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works,'[292] and 'clothing, bedding, means of

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289 *ICRC Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, at para. 2095:
"It should be emphasized that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians. Unfortunately it is a well-known fact that all too often civilians, and above all children, suffer most as a result. If the effects of the blockade lead to such results, reference should be made to Article 70 of the Protocol ' (Relief actions), ' which provides that relief actions should be undertaken when the civilian population is not adequately provided with food and medical supplies, clothing, bedding, means of shelter and other supplies essential to its survival. Such actions may be very extensive."

290 See art. 59 of the Fourth Geneva Convention which provides that:
"If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing. All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection."

291 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 60.

292 Article 54(2), Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in Armed Conflicts (Protocol I), 8 June 1977

shelter… and objects necessary for religious worship.'[293] Moreover, in HCJ 201/09 *Physicians for Human Rights v. Prime Minister* and in HCJ 248/09 *Gisha - Legal Center for Freedom of Movement v. Minister of Defense294* (joined), in which the Supreme Court of Israel considered the humanitarian obligations of the IDF during Operation Cast Lead, the Court recognized that international law required the civilian population to receive access to industrial diesel for operating the local power station in Gaza, as well as additional humanitarian requirements, such as cooking gas, diesel oil for transport, water, food and medications.[295]

79. Humanitarian organizations and human rights organizations have raised concerns regarding the sufficiency of such essential objects in the Gaza Strip, including the lack and means of shelter. With regard to the provision of shelter, Israel has indeed imposed restrictions on the import of construction materials into the Gaza Strip and it closely supervises the transfer of these materials. These restrictions are put in place because of the risk that the identified materials may be used for military purposes, since the intelligence information indicates that the Hamas uses these materials extensively in order to fortify buildings and tunnels.[296] It is clear that the restrictions were not imposed in order to prevent the use of these materials by the civilian population of the Gaza Strip. Moreover, Israel is even working in full cooperation with the international community in order to allow the passage of building materials for various projects that are supervised and approved by it, in a manner that is consistent with its duty to supply aid to the civilian population.[297]

Indeed, as described above, Israel imposes various restrictions on the supply of diesel and fuel but according to the testimony of the Coordinator of Government Activities in the Territories, not on the supply of electricity. However, diesel oil is needed in order to operate the power plant in Gaza for the supply of electricity. However, the Supreme Court has determined, according to the evidence brought before it in *Al-Bassiouni v. Prime Minister*, that despite these restrictions, and even if the restrictions were imposed on the supply of electricity, Israel is in compliance with its humanitarian obligations. In *Al-Bassiouni v. Prime Minister* the Court said that the relevant Palestinian authorities have made clear 'they have the capability to carry out load reductions if limits are placed on the

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[hereinafter *Additional Protocol I*].

293 *Id.*, at art. 69.

294 *Testimony of Physicians for Human Rights*, *supra* note 244, at 22, para. 27.

295 *Id.*, at para. 26.

296 *IICC report* (Jun. 14, 2010), *supra* note 83.

297 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 104.

power lines, and they have made actual use of this capability in the past.'[298] Moreover, like many issues that arise with regard to the humanitarian situation in the Gaza Strip, it should be remembered that the scope of the electricity supply is also affected by the relations between the Palestinian Authority and the Hamas, since a significant part of the Gaza Strip's electricity needs is not supplied by Israel.

80. There is therefore no evidence before the Commission that Israel is denying objects essential for the survival of the civilian population, and, therefore, there is no basis for the conclusion that Israel is in violation of international humanitarian law in this regard. On the contrary, considerable evidence was presented to the Commission to show that Israel allows the passage of objects essential for the survival of the civilian population and that it provides humanitarian aid as required by the rules of international humanitarian law in those areas that human rights organizations identify as a source of concern.

Israel has therefore acted pursuant to the principles of customary international humanitarian law with regard to the imposition of the naval blockade, as stated in article 102(a) and article 103 of the San Remo Manual.

Passage of medical supplies

81. Another well recognized requirement of customary international humanitarian law is to allow the passage of medical equipment, subject, however, to the right of the blockading party to prescribe technical arrangements, including a search, under which such passage is permitted[299] (it should be noted that on board some of the vessels in the flotilla there were some medical supplies as evidence of the humanitarian nature of the flotilla).[300]

82. Humanitarian and human rights organizations raised a concern regarding the adequacy of the medical supplies and the medical services in the Gaza Strip. However, in the complex situation that prevails in the Gaza Strip, it is not necessarily Israel that is responsible for any shortages. In this context, it should be noted that according to the report of the International Committee of the Red Cross: 'Stocks of essential medical supplies have reached an all-time low because of a standstill in cooperation between Palestinian authorities in Ramallah and Gaza.'[301] Moreover, certain types

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298 *Al-Bassiouni* case, *supra* note 140, at para. 18.
299 See *San Remo Manual*, *supra* note 110, rule 104.
300 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 47.
301 See *Gaza Closure*, *supra* note 236.

of supplies are legitimately restricted by Israel for security reasons, such as optical equipment, which, in addition to its ordinary use, can be used for military purposes.[302] No evidence was presented before the committee to the effect that Israel prevents the passage of medical supplies apart from those included in the list of materials whose entry into the Gaza Strip is prohibited for security reasons.[303] According to the Coordinator of Government Activities in the Territories, sometimes a request to transfer complex medical equipment requires careful examination, which can be time-consuming, and of course it is preferable that the length of time required be as short as possible. However, from the testimony of the Coordinator of Government Activities in the Territories, it can also be seen that when the relevant Israeli authorities are notified of a shortage of any medical supplies, there is an organized system for replenishing those supplies.[304]

83. In a press release on June 14, 2010, the International Committee of the Red Cross indicated how a shortage of certain materials might result in a deterioration in the maintenance of medical supplies, and as a result, to requests from many inhabitants of the Gaza Strip to seek medical treatment in Israel.[305] Israel has indeed allowed a substantial

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302 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 105; *Testimony of Physicians for Human Rights*, *supra* note 244, at 7.

303 *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010*, *supra* note 217, Appendix A; More accurately, the restrictions stem from three sources - the instructions of the Israeli Ministry of Health, the instructions of the Israeli Ministry of Industry and Commerce, and the supervisory orders on defense export. In this context see *Reference to Claims Made by Physicians for Human Rights to the Commission to Examine the Maritime Incident* (opinion by Government Activity Coordinator in the Territories, Jan. 6, 2011), marked by the Commission as exhibit 166 [hereinafter *Response by Government Activity Coordinator in the Territories to Claims Made by Physicians for Human Rights*].

304 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 28, It should be mentioned that the document transferred by the Physicians for Human Rights Organization to the Commission on Nov. 7, 2010 was appended with a list of medical equipment whose entrance was not approved or was delayed (see letter from the Physicians for Human Rights Organization to the Turkel Commission titled *Follow Up Report to Testimony of Physicians for Human Rights to the Turkel Commission* (Nov. 7, 2010), found in the folder marked by the Commission as exhibit 165. From the reference submitted by the Government Activity Coordinator to this matter it seems that the majority of the requests are unknown to the Gaza District Coordination Office. As to the requests which the District Coordination Office was able to track down it was mentioned that of the initial request, which included 21 items of complex medical equipment which required a meticulous examination by the security forces, 18 items were approved and there was a delay in transferring three items due to a shortage of these items (*Response by Government Activity Coordinator in the Territories to Claims Made by Physicians for Human Rights*).

305 See *Gaza Closure*, *supra* note 236.

number of inhabitants of the Gaza Strip access to the health system in Israel for various reasons, including the historical connection between the Gaza Strip and Israel (for years before the land crossings policy and the naval blockade were introduced, the inhabitants of the Gaza Strip were permitted to consult experts and receive advanced treatments in the Israeli health system). The evidence also shows that the number of persons requesting to leave the Gaza Strip in order to receive medical treatment has increased during the period since the land border crossings were introduced. This is apparently the result of Egypt introducing a restrictive border policy at the Rafah crossing, which traditionally was also used to exit the Gaza Strip (in this context, it should also be noted that the COGAT stated that activity at the Rafah crossing was significantly expanded after Operation 'Cast Lead').[306] In this regard it should be noted that even after this crossing was opened on June 1, 2010, the number of persons requesting treatment in the Israeli health system has remained high, apparently because many patients prefer it.[307]

84. Sorting through the evidence of whether Israel is adequately meeting its humanitarian law obligations in this area is in many respects an exercise in trying to sort out statistics. The Israeli authorities presented detailed statistics regarding the number of inhabitants of the Gaza Strip that are permitted to exit in order to receive medical treatment. Thus, for example, according to the material that was presented to the Commission, in 2009, Israel allowed 11,036 patients and their family members to exit the Gaza Strip to receive medical treatment.[308] It is important to point out that 86% of the exit applications that were submitted during this period were approved, whereas of the remaining 14%; about 10% were cancelled by the Palestinian Authority for its own reasons.[309] In their testimony before the Commission, representatives of Physicians for Human Rights also focused on delays in processing applications to receive medical treatment in Israel, and particularly the suffering caused to those involved. According to their testimony, approximately 70%-80% of the applications take between eight weeks to three months to be processed, and in many cases medical treatment is prevented as a result, even if a permit is approved at the end of the process.[310] It should be noted that, obviously, delays in the approval process that affect the health of the patient should be avoided wherever

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306 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 60-61; *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010*, *supra* note 217, at 20-26.

307 *Testimony of Physicians for Human Rights*, *supra* note 244, at 14.

308 *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 65.

309 *Id.*, at 11.

310 *Testimony of Physicians for Human Rights*, *supra* note 244, at 7.

possible. However, it must also be remembered that most of the reasons for the delays involve security issues. It should also be understood that a Palestinian patient seeking to exit for medical treatment undergoes a complex process before the request reaches the Gaza Strip DCO. In general, the patient obtains a referral from a Palestinian hospital, which he submits to the representative of the Palestinian Ministry of Health in the Gaza Strip, who transfers it to the Ministry of Health in Ramallah for review. The Palestinian Ministry of Health transfers the referral to the Palestinian office which coordinates the treatment with a hospital in Israel or the West Bank. Only at this stage is the request transferred to the Gaza Strip DCO, who examines the request for security issues. Thus, a significant part of the process is not conducted by Israel at all.[311] What is crucial in terms of meeting international humanitarian law obligations in this regard is that there is a specifically established system put in place by the Israeli authority that serves to meet humanitarian needs while seeking to address the security concerns.

85. An analysis of the state of the health system in the Gaza Strip shows that a distinction should be made between the *existence* of a health care system and the *standard* of medical care. Thus, for example, a report of one of the UN agencies (the UN Officer for the Coordination of Humanitarian Affairs) stated:

> 'The blockade, the internal Palestinian divisions and the "Cast Lead" offensive have undermined the ability of the health system in Gaza to function properly. As a result, *while most services are available to the population and there were no outbreaks of communicable diseases, there has been an overall decline in the quality of health services provided to the population*.' [312] [emphasis added]

86. Indeed, as evident from the testimony of Physicians for Human Rights, significant challenges face the health system in the Gaza Strip. However, these challenges are not the sole responsibility of Israel. It should also be noted that, even in this regard, Israel is acting in cooperation with the Palestinian Authority and the international community in order to minimize the problems. However, Israel should continue in the future to examine whether it is possible to improve the current position, so that the humanitarian needs of the inhabitants of the Gaza Strip will be fully addressed.

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311 *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010*, *supra* note 217, at 22.

312 See *Consolidated Appeal*, *supra* note 219, at 26

The Commission has reached the conclusion that Israel is complying with its obligations pursuant to international humanitarian law under article 104 of the San Remo Manual for the passage of medical supplies during a naval blockade. It should be emphasized that any passage of medical supplies to the Gaza Strip by sea would be possible by the method of transporting them via Ashdod port and the land border crossings.

The military advantage of the naval blockade versus harm caused to the civilian population

87. According to article 102(b) of the San Remo Manual, the damage caused or expected be caused to the civilian population should be considered in relation to the direct and concrete military advantage anticipated from the imposition of a naval blockade.[313] This principle is usually called the 'principle of proportionality.'[314] In this context, great care must be taken in its application. The obligation is not to cause "excessive" damage in relation to the concrete and direct military advantage anticipated from the blockade.[315] In that context the term "excessive" has been suggested to mean "the disproportion is clearly discernable".[316] The fact that considerable damage has been caused does not necessarily mean that the damage is 'excessive.' The word 'excessive' does not refer to an absolute concept and it is always measured 'in light of the military advantage that the attacker anticipates to attain through the attack.'[317] A significant military advantage can justify significant damage, whereas a marginal advantage will not.[318]

88. In his testimony before the Commission, the Military Advocate-General expressed doubt about the customary status of this rule although he also indicated that Israel implements it.[319] However, Like many of the

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313 See also Dinstein, The Conduct of hostilities, *supra* note 86, at 138, in applying that test he states:
"in accordance with the general (customary law) principle of proportionality, the expected injury to civilians in the wake of a blockade must not be excessive in relation to the military advantage anticipated (and, consequently, that a blockade must not have the starvation of civilians as its sole purpose".

314 *San Remo Manual*, *supra* note 110, rule 102(b) and *San Remo Explanation*, *supra* note 110, at 179 paras. 102.3-4.

315 *The Air and Missile Warfare Manual*, *supra* note 115, at 297.

316 Dinstein, The Conduct of hostilitites, *supra* note 86, at 120.

317 *The Air and Missile Warfare Manual*, *supra* note 115, at 92.

318 *Id.*

319 *Military Advocate-General's testimony*, *supra* note 98, at 54. In the position paper submitted by the MAG, it was stated more expressly that the principle of proportionality in the San Remo Manual is not customary international law but that this rule is an example of the progressive developments in the San Remo Manual, see *MAG position paper*, *supra* note 1.

provisions of the San Remo Manual, this rule has been adopted in various military manuals,[320] international humanitarian law texts[321] and other legal literature.[322] The principle has also been adopted by the Harvard Air and Missile Warfare Manual of 2009.[323] Humanitarian and human rights organizations have also addressed the effect of the naval blockade on the civilian population of the Gaza Strip in terms of its proportionality.[324] The Commission therefore adopts the position that article 102(b) does indeed reflect an obligation under the rules of customary international law.

89. As for the military advantage, in his testimony before the Commission, the Chief of Staff, Lieutenant-General Gabi Ashkenazi, gave details of the nature of the current threat posed by the Hamas, which the naval blockade is intended to counter. The Chief of Staff explained that the Hamas has taken advantage of the relative calm after Operation Cast Lead in order to expand its military abilities in two main areas: arming itself with rockets and developing ground-based capabilities.[325] The Chief of Staff went on to explain that in the past, the Hamas only had mortars; then they bought short-range Qassam missiles; and today, it has longer-range missiles. The Chief of Staff stated that rockets, anti-tank missiles, anti-aircraft missiles, night vision equipment and additional military equipment is smuggled into the Gaza Strip via tunnels, by land, and by the sea. The main efforts of the Israeli navy currently focus on disrupting smuggling, especially because of the fact that it is possible to transport much larger amounts of weapons by sea than via the tunnels.[326] The Chief of Staff's assessment is that Hamas is also trying to improve its abilities to act in deep water against Israeli navy vessels. Therefore, the Chief of Staff anticipated that the threat in the territorial waters of the Gaza Strip derives not only from the possibility that vessels of terrorists laden with weapons or military supplies will reach the coast of the Gaza Strip but also from the possibility that ships laden with explosives will leave this area in

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320 *The Air and Missile Warfare Manual*, *supra* note 115, at 297. At the same time, see *U.S. Navy, The Commander's Handbook*, *supra* note 92, at paras. 7.7.2.5-7.7.3 (The US manual is silent on this issue. making reference to the specific requirement not to starve the civilian population or deny it objects essential to its survival, as wells as permitting neutral vessels engaged in transporting relief supplies to pass through the blockade cordon subject to prescribed technical arrangement.

321 Dinstein, The Conduct of hostilities, *supra* note 86, at 137-138; and *Humanitarian Law Handbook* (2d ed.), *supra* note 113, at at 555, fn395 [for reference to the *San Remo Manual*, Rule 102(b)].

322 *Heintschel von Heinegg*, Int'l L. Stud, *supra* note 85, at 217.

323 *The Air and Missile Warfare Manual*, *supra* note 115, at 91-94.

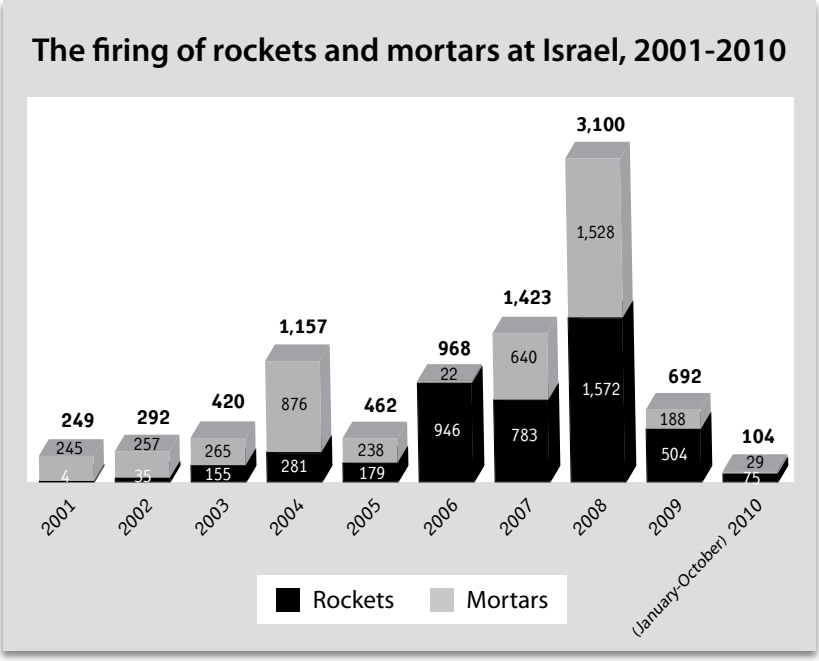
324 See *Gaza Closure*, *supra* note 236.

325 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 8.

326 *Id.*, at 9-10.

the direction of the coast of Israel or in the direction of strategic facilities in the sea.[327] An additional purpose addressed by the Chief of Staff is to prevent the unsupervised flow of money to the Gaza Strip, something that happens from time to time via the tunnels, but can be done much more easily by sea. The Chief of Staff stated in his testimony that money is 'oil upon the wheels of terror' since large amounts of money are required to finance the smuggling operations.[328] According to this testimony and other evidence, the Commission is persuaded that were it not for the naval blockade, the Hamas could further increase its rearmament or attack the State of Israel by sea.

Moreover, as stated, the combined purpose of the naval blockade and the land crossings policy is to strategically limit the ability of the Hamas to carry out operations against Israel and its citizens. An important fact that should be taken into account in this regard is that the number of missile attacks from the Gaza Strip at Israel that has fallen from a record of 3,278 in 2008 to 165 in 2010 (as of October 7, 2010).[329]



Taken from Information Provided by COGAT to the commission

327 *Id.*, at 8.
328 *Id.*, at 11.
329 *Israeli Defense Forces: Rocket Attacks towards Israel*, *available at* http://idfspokesperson.com/facts-figures/rocket-attacks-toward-israel (2010).

It could be assumed that Operation Cast Lead had a significant effect on Hamas's ability to attack Israel, but, as stated above, one of the purposes of the naval blockade is also to close Hamas's rearmament channel. Indeed, it is not always possible to determine the precise effect of a naval blockade, and it should be remembered that naval operations are often combined with land operations.[330] Therefore, in the present case we should consider the overall combined effect of Operation Cast Lead, additional targeted operations, the naval blockade and the land crossings policy, by examining the decrease in the Hamas's ability to attack Israel.

In terms of anticipated military advantage, the Commission's opinion is that Israel's anticipated military gains can be assessed in part by reference to the fact that the attacks on Israel and its citizens have decreased significantly. Admittedly, recently the firing of rockets at Israel has recommenced. However, it would appear that the combined measures that were adopted have led to the Hamas being relatively limited in its abilities and the speed of rearmament is reduced relative to what it would have been if these steps had not been undertaken. This 'anticipated military advantage,' which concerns restricting Hamas's ability to continue to attack the citizens of Israel, is significant, especially in view of Israel's responsibility to protect its citizens against attacks and security threats, the scope and duration of the attacks in the past, and the fact that Israel is confronted against an enemy that is committed to Israel's destruction.

90. It is obvious that determining the anticipated military advantage of imposing the naval blockade is only the first stage in weighing its proportionality, and there remains the question of what criteria should be used in order to determine whether the damage to the civilian population in this regard is 'excessive.' Article 102(b) of the San Remo Manual recognizes that the civilian population in a territory at war will suffer to some extent. Indeed, this suffering is a tragic reality of both the population in Israel and the population of the Gaza Strip. International humanitarian law therefore adopts a practical approach to the realities of the conflicts, in that its rules do not necessarily preclude a negative effect on the population but seek to limit it.

The question to be resolved, therefore, is what constitutes 'damage' within the meaning of article 102(b) of the San Remo Manual. In the Commentary to the Sam Remo Manual, the concept of 'damage' is linked to starvation.[331] Article 103 of the Manual further provides that if the

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330 Till, *Naval Blockade*, *supra* note 107, at 130.
331 *San Remo Explanation*, *supra* note 110, at 179, para. 102.4.

civilian population in the area subject to a naval blockade is inadequately provided with food and other objects essential for its survival, the blockading party is obliged to allow free passage of foodstuffs and other basic objects, subject to the supervision of the blockading party. Further guidance regarding the proper interpretation may be found in the Harvard Air and Missile Warfare Manual, in which rule 157(b) replaces the word 'damage' with the word 'suffering.' The commentary on the Harvard Air and Missile Warfare Manual says that 'The main thrust of Rule 157(b) is to preclude a "hunger blockade" which causes severe suffering of the civilian population.'[332] Nonetheless, the Commentary states that 'suffering' is not confined to extreme instances such as a 'hunger blockade.' Where such suffering exists, the Commentary provides that the '…blockade has to be lifted, or free passage of foodstuffs and essential supplies is to be allowed…'[333] From these remarks, and from the context of the rule of proportionality in both the San Remo Manual and the Harvard Air and Missile Warfare Manual, it clearly follows that the 'damage' or 'suffering' discussed in international humanitarian law are mainly those that are identified in the prohibitions of starvation and deprivation of objects essential for the survival of the civilian population. In this context, we reiterate our conclusion above that the naval blockade has not caused starvation in the Gaza Strip, and that Israel has not prevented the passage of objects essential for the survival of the civilian population or the passage of medical supplies.

91. In the course of examining the principle of proportionality, the overall humanitarian cost of Israel's economic warfare should also be considered. The purpose of the economic warfare in the Gaza Strip is to weaken the economy in order to undermine the Hamas' ability to attack Israel and its citizens.[334] The non-security related restrictions on the passage of goods - such as the restrictions upon certain food products - are a part of this strategy. The restrictions on items such as food are of particular concern, *inter alia,* because of the unequivocal prohibition against starvation, but also because such restrictions can have a significant effect on the civilian population. Israel's policy of economic warfare gives rise, in general, to two significant issues. First, to what extent is it permissible for the land crossings policy and the naval blockade to restrict the access to foodstuffs and other basic products that are used solely for civilian needs when these restrictions do not cause starvation. The second problem

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332 *The Air and Missile Warfare Manual*, *supra* note 115, at 297, para. 1.

333 *Id.*, at 297, para. 3.

334 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 19; *Leader of the Opposition Tzipi Livni's open door testimony*, *supra* note 177, at 10-11.

concerns the duration of the land crossings policy and naval blockade, because there is a real danger that the longer they last, systemic damage to the economy will result. Therefore, it may be assumed that the ability of the civilian population to recover from the blockade after it is removed will be adversely affected the longer it lasts. These two issues should be taken into account when reviewing the principle of proportionality on an ongoing basis.

92. When we examine the principle of proportionality, a relevant comparison is the international responses to the economic sanctions imposed by the United Nations Security Council pursuant to chapter 7 of the United Nations Charter (i.e. when it determines that there is a threat to world peace, a breach of the peace or acts of aggression).[335] Admittedly, because of the deadlock in the Security Council during the Cold War, economic sanctions were imposed by the United Nations only twice during that period.[336] By contrast, in the decades since the fall of the Iron Curtain, the Security Council has imposed economic sanctions in more than a dozen cases.[337] Pursuant to article 42 of the United Nations Charter,

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335 See U.N. Charter, chapter 7, art. 41:
"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".
It should be mentioned that the establishment of a naval blockade or a land crossing policy are actually a type of "economic sanctions" or "economic measures" intended to disrupt or prevent the passage of goods or services to a country or from it. Sanctions such as these may be imposed according to a decision by a country or a regional organization (for the purpose of this report, these sanctions will be referred to as "unilateral") or as binding United Nation's Security Council [hereinafter The UN Security Council] resolution (for the purpose of this report, these sanctions will be referred to as "multilateral sanctions"). See Farrall, Sanctions, *supra* note 227, at 107.
Using such unilateral sanctions have been common throughout history (see Gary Clyde Hufbauer et al., Economic Sanctions Reconsidered: Supplemental Case Histories 142-270 (3rd ed., 2007), which presents dozens of case studies of economic sanctions). Such sanctions were placed, among other cases, within armed conflicts; as a tactic to weaken opponents; to counter expropriation; and lately, to counter the proliferation of weapons of mass destruction and to combat international terrorism (id., sanctions database on accompanying CD, 14, 65-75). At the same time, the establishment of a unilateral naval blockade for purposes of economic warfare during an armed conflict [hereinafter "Economic Warfare"; historically, it was not unusual to call such a blockade a "commercial blockade"] have been the exception in the post World War II period.

336 Prior to 1990, the UN's obligatory sanctions were only placed on South Rhodesia (1966) and South Africa (1997). See Farrall, Sanctions, *supra* note 227, at 107; See also Kimberly Ann Elliot, *Trends in Economic Sanctions Policy*, *in* International Sanctions, Between Words and Wars in the Global System 3, 10-11 (Peter Wallensteen & Carina Staibano eds., 2005).

337 For an updated list of sanctions placed by the Security Council see UN Security Council

if the imposition of economic sanctions is ineffective, the Security Council may also take military action, and *inter alia* order the imposition of a naval blockade.[338] The power of the Security Council to impose economic sanctions 'that do not involve the use of military force' and the recognition of this form of warfare within the scope of the laws of armed conflict reflect the legality of using economic sanctions and the effectiveness of exercising economic pressure in order to influence States and other parties. Here, it should be stated that operations that are carried out with the approval of the United Nations Security Council are not necessarily subject to the same rules of international law that are mainly intended to regulate the conduct of states within the context of an armed conflict.[339] However, the deliberations that took place with regard to the imposition of these economic sanctions can help us find a standard for assessing the way in which they may be used.

Before the analysis, it is important to clarify that when assessing the use of economic sanctions as a means of economic warfare, care should be taken not to focus merely on the tactical level of conducting warfare[340] in the sense of 'seizing ground and weakening or neutralizing the enemy's armed forces.'[341] An armed conflict is ultimately conducted in order to achieve strategic aims, and not merely tactical goals.

Sanctions Committee: Security Council Resolutions on General Issues Concerning Sanctions, *available at* www.un.org/sc/committees/sanc_res.shtml (2006). See also Craig H. Allen, *Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives*, 81 Int'l. Stud. Ser. U.S. Naval War Col. 77, 122, fn. 16 (2006). The term Maritime Interdiction Operations have been used to cover a variety of different measures; while it was originally contemplated as naval operations to enforce UN Security Council Resolutions imposing embargoes the term is now used in a broader sense, *inter alia*, to cover naval operations for purposes of peacekeeping or to enforce economic sanctions.

See also Hufbauer et al., *supra* note 335, at 33.

338 See U.N. Charter, chapter 7, art. 42:
"Should the Security Council consider that measures provided for in art. 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".

339 *Heintschel von Heinegg*, *EPIL*, *supra* note 91, para. 55.

340 See the United States Department of Defense (DOD) Dictionary of Military and Associated Terms, Joint Publication 1-02 (Jul. 2010), *available at* http://www.dtic.mil/doctrine/dod_dictionary/data/t/7465.html (which defines the "tactical level of war" as "The level of war at which battles and engagements are planned and executed to achieve military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives.").

341 See *ICRC Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, at 57, para. 2218; see also letter from Gisha - Legal Center for Freedom of Movement to The Public

93. 'Comprehensive' sanctions (i.e., sanctions that affect all or almost all goods, products and economic resources), as opposed to 'targeted' or 'smart' sanctions (i.e., sanctions that only affect specific goods or products or that restrict a specific service of a specific economic instrument) have been imposed by the United Nations Security Council five times, all of which, with one exception, at the beginning of the 1990s.[342] These measures gave rise to criticism because of the drastic negative effects that they had on vulnerable groups in the civilian population, especially on children.[343] The conflict following the Iraqi invasion of Kuwait is an example of sanctions that led to a wave of critique during the 1990s. In this instance, the United Nations Security Council also imposed economic sanctions that are commonly referred to as a 'naval blockade,' even though no use was made of this term in the actual resolution that approved them.[344] Thus, for example, it is expressly written in resolution 661 of the United Nations Security Council, which imposed a complete export and import embargo on Iraq, that only '… supplies intended *strictly* for medical purposes, and, *in humanitarian circumstances*, foodstuffs…'[345] [emphases added] would be allowed into Iraq. The significance and effect of the economic sanctions and the naval blockade imposed on the Iraqi population are widely documented,[346] and it is superfluous to discuss them once more here. The UN sanctioned blockade prompted allegations of breaches of international

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Commission to Examine the Maritime Incident of May 31, 2010 (Oct. 10, 2010).

342 See SC Res 253 (May 29, 1968) concerning Southern Rhodesia; SC Res 661 (Aug. 6, 1990) concerning Iraq; SC Res 757 (May 30, 1992) and SC Res 820 (Apr. 17, 1993) concerning the former Yugoslavia; and SC Res 917 (May 6, 1994) concerning Haiti.
See also Farrall, Sanctions, *supra* note 228, 107-108; as well as Nicco Schrijver, *The Use of Economic Sanctions by the UN: An International Legal Perspective*, *in* International Economic Law and Armed Conflict 129-130; 132-135 (H.H.G. Post ed., 1994).

343 See for example *UNICEF: Iraq Watching Brief*, *available at* www.unicef.org/evaldatabase/files/iraq_2003_watching_briefs.pdf (2003) [hereinafter *Iraq, Watching Brief*]. Various studies concluded that during the period of the Iraq sanctions, infant and child mortality rates increased significantly: See Christopher C. Joyner, *United Nations Sanctions after Iraq*: *Looking Back to See Ahead*, 4 Chi J. Int'l L. 329, 338-339 (2003).
See also *CESCR: Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 8*, E/C.12/1997/8, ¶ 5, 15, *available at* www.unhchr.ch/tbs/doc.nsf/0/974080d2db3ec66d802565c5003b2f57?Opendocument (2007) [hereinafter *CESCR, Comment 8*].

344 See Yoram Dinstein, War, Aggression and Self-Defence 295 (2005); see also *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 54 (where he notes technically the blockade can be discussed in terms of "non-military enforcement" under article 41 of the Charter).

345 S.C. Res. 661, ¶3, UN Doc. S/RES/661 (Aug. 6, 1990).

346 See for example Farrall, Sanctions, *supra* note 227, at 224-227; *Iraq, Watching Brief*, *supra* note 343; Joyner, *United Nations Sanctions*, *supra* note 343, at 338-339; *CESCR, Comment 8*, *supra* note 343, at para. 2.

humanitarian law,[347] although there appears to be no suggestion by the United Nations or the participating member states that the blockade was ultimately considered to have been illegal.[348] Responding to the critiques, various governments sponsored processes in which methods to make smart sanctions more effective were examined as alternatives to comprehensive sanctions.[349] This trend could also be noted in the United Nations General Assembly,[350] and the United Nations Security Council has not been indifferent to this process either; in recent years it has not imposed comprehensive sanctions and it has also established a working group whose function is to recommend how to improve the effectiveness of smart sanctions.[351] However, the implementation of this new approach also gives rise to difficulties. It has been noted that 'Even though sanctions of the scope imposed on Iraq *may* not be employed again, it is likely that relatively comprehensive sanctions will be used in the future, given that mere arms embargoes or travel bans will not prove sufficiently coercive in all situations.'[352]

94. In sum, when evaluating proportionality in this context, the negative effect on the civilian population inherent in economic sanctions, whether in or outside an armed conflict, should be taken into account. While it is not possible to anticipate or identify the effects of such sanctions with scientific precision, the goal is to limit the suffering of civilian populations. Israel has indeed done this by setting up the comprehensive

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347 See Marc Bossuyt, *The Adverse Consequences of Economic Sanctions*, Working Paper, Economic and Social Council, E/CN.4/Sub.2/2000/33 para. 71 (2000), *available at* www.globalpolicy.org/component/content/article/202/42501.html;
Denis J. Halliday, *The Deadly and Illegal Consequences of Economic Sanctions on the People of Iraq*, 7 THE BROWN J. OF WORLD AFF. 229 (2000).

348 See for example Halliday, *Deadly and Illegal Consequences*, *supra* note 347, *Id.*; CORTRIGHT & LOPEZ, THE SANCTIONS DECADE, *supra* note 232, at 43, 45-48, 57.

349 These processes are: Interlaken processes (1998-2001); Bonn-Berlin (1999-2001); Stockholm (2001-2002). See Thomas J. Biersteker et al., *Consensus from the Bottom Up? Assessing the Influence of the Sanctions Reform Processes in* INTERNATIONAL SANCTIONS, *supra* note 336, at 15-31.

350 2005 World Summit Document (Sep. 2005) A/60.1/L.1 para. 106, *available at* www.un.org/summit2005/documents.html. In the 2005 World Summit Outcome Document, the issue of sanctions was addressed, as member states pledged to "ensure that sanctions are implemented in ways that balance effectiveness to achieve the desired results against the possible adverse consequences, including socio-economic and humanitarian consequences, for populations and third States.").

351 Report of the Informal Working Group of the Security Council on General Issues of Sanctions (Dec. 22, 2006) S/2006/997, *available at:* www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WG%20Sanctions%20S2006997.pdf

352 Robin Geiss, *Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-up Assessments of Long-Term Effects*, 18 HARV. HUM. RTS. J. 167, 198 (2005) [emphasis added].

mechanism for supervising and monitoring the transfer of humanitarian supplies to the Gaza Strip via the land border crossings. From the material that was brought before the Commission, it is clear that Israeli authorities regularly supervise the land crossings policy and make adjustments to this policy, in order to provide a response to problems brought to their attention. The Coordinator of Government Activities in the Territories meets with members of the Palestinian Authority, human rights groups, and representatives of the international community on a regular basis. At the end of 2009, such a meeting led to an increase in the variety of goods that could be brought into the Gaza Strip in order to reconstruct and repair residential buildings (such as glass, aluminum, and wood).[353] Nonetheless, it seems worthwhile to consider the progress that was made around the world with regards to targeted or "smart" sanctions. It seems that the Israeli government's current policy is more in line with those recommendations; in other words, there should be continued efforts to making the sanctions more focused on the Hamas itself.

95. With regard to the duration of the economic warfare, the Commission is of the view that there is a danger that comprehensive restrictions on goods may not be regarded as proportionate indefinitely As stated in the Harvard Air and Missile Warfare Manual, 'The suffering of the civilian population may not originally be expected to be excessive in relation to the concrete and direct military advantage anticipated. However, later on, there may be empirical evidence to the effect that such excessive suffering is actually taking place.'[354] These remarks emphasize the need to maintain a regime of effective supervision and to carry out periodic reviews at the highest levels of government with regard to the restrictions imposed on the civilian population. Nonetheless, the Commission concludes that with regard to the period that it examined - from the introduction of the land crossings policy on September 19, 2007, until the incident on May 31, 2010, which is the subject of this report -the naval blockade and the land crossings policy did not become disproportionate pursuant to the rules of international law because of their duration.

96. In reaching its conclusions, the Committee notes that "proportionality" - a standard that directs decisions within international humanitarian law - often involves interpretation of difficult decisions and complex assessments. It has been said that 'Although tribunals and other commentators frequently endorse the principle of proportionality,

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353 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 120.
354 *The Air and Missile Warfare Manual*, *supra* note 115, at art. 157(b), para. 3.

they have been less fastidious in explaining the exchange rate they have used to equate disparate integers…'.[355] An assessment of proportionality requires striking a balance on difficult and delicate questions, colloquially known as a 'comparison of apples and oranges,'[356] which in our case is between the military advantage anticipated from the imposition of a naval blockade on the one hand, and humanitarian considerations on the other.[357] The Supreme Court addressed the principle of 'proportionality' in *Public Committee Against Torture v. Government* within the context of considering the scope of judicial review, stating: 'Proportionality is not a precise criterion. Sometimes there are several ways of satisfying its requirements. A margin of proportionality is created. The court is the guardian of its limits.'[358] In this regard it is important to emphasize two issues:

Within the "zone of proportionality", there can be disagreement regarding the impact of a decision and the answers can be politically and morally controversial. There is no exact formula against which a determination of excessiveness can be made. As a result, a determination that an act is "disproportionate" is invariably left to the clearest of examples.

In addition the monitoring and reviewing of Israeli authorities concerning the legality of the blockade remain subject to scrutiny by the Israeli judicial system. Israeli authorities have often be called upon to defend their position before the Supreme Court of Israel, and in the framework of the litigation, all parties are given an opportunity to present their claims.[359] As a result of this, Israeli authorities operate with the knowledge that the policy they introduce and implement has been examined and will be examined by an independent court in a democratic state where many human rights organizations are active in bringing these issues before the court. Indeed, it is regrettable that much of the criticism leveled at Israeli policy with regard to the Gaza Strip does not take into account the essential and direct role that the Israeli legal system plays in ensuring that operations carried out by the Israeli Government satisfy the requirements of the rule of law. Such an approach greatly undermines the basis of the scrutiny and testifies to an approach which regards the international community as the only arbiter of the operations of the Israeli

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355 Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 Am. J. Int'l. L. 715, 729 (2008).
356 *Id.*
357 *Id.*, at 716.
358 *Targeted Killing* case, *supra* note 37, at para. 58.
359 See for example *Al-Bassiouni* case, *supra* note 140.

Government. This approach is flawed from a legal, policy, and practical perspective.

97. As stated above and to complete the picture, it should be noted that in June 2010, the Israeli Government changed the land border crossings policy from a policy in which only the transfer of limited humanitarian supplies was allowed to a policy where only the entry of goods that have military purposes is prohibited.[360] The Prime Minister, Mr. Benjamin Netanyahu, stated that this change was made for policy reasons, and not because the land border crossings policy was contrary to international humanitarian law.[361] On December 8, 2010, the Government further determined that subject to certain restrictions, a gradual plan would be approved for allowing goods to leave the Gaza Strip for destinations outside of Israel and the West Bank. Nonetheless, a report published by various human rights organizations on November 30, 2010, states that in practice only a slight change in Israel's policy toward the entry of goods to the Gaza Strip was apparent after Israel announced this relaxing of its land border policy.[362] The Commission did not examine new evidence relating to the new land crossings policy and therefore it is unable to assess its

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360 The current list of items whose entrance is controlled includes, among others; weapons and ammunition, "dual-use" objects, and building materials, see *Israel Ministry of Foreign Cases: Gaza: Lists of Controlled Entry Items*, *available at* www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Lists_Controlled_Entry_Items_4-Jul-2010.htm (2010).

361 *Prime Minister's Open Door Testimony*, *supra* note 82, at 17.

362 FIDH (International Federation for Human Rights, Dashed Hopes: Continuation of the Gaza Blockade (Nov. 30, 2010), *available at* http://www.fidh.org/DASHED-HOPES-CONTINUATION-OF-THE-GAZA-BLOCKADE; at the same time, in Gisha's report of December 2010 it was stated: "The past five months since the July 6th implementation of the government's decision have seen a steady increase in the amount of consumer goods entering the Gaza Strip, corresponding with the relaxing of the ban on household items and food products, and infrastructure changes made to the Kerem Shalom Crossing. Despite a seemingly promising International Monetary Fund report issued in September reflecting growth in the Strip, however, socioeconomic indicators point to a much less positive picture. Rates of unemployment, food insecurity, and poverty remain high." The report by Gisha points to the changes made in the field in terms of Israel's policy. Thus, for example, the report mentions that the volume of goods entering has increased to about 40% of need, rather than 22% of need during the past three years, "Some limited export has begun in the past weeks, with a promise to allow further export of items from the agriculture, furniture and light industry sectors, according to a December 8th cabinet decision." Likewise the report mentions that there is "a slight increase in the number of permits given to businesspersons" to exit the Gaza Strip. The report asserts that these easements are insufficient and that to obtain "true and sustainable economic recovery […] requires removing remaining restrictions on the movement of goods and people." See "Reconstructing the Closeure: Will recent changes to the closure policy be enough to build in Gaza?" (position paper by the Gisha organization - Legal Center for Freedom of Movement, December 2010).

effect. However, insofar as it might have improved the position of the civilian population in the Gaza Strip, it is of course to be commended.

The Commission has therefore reached the conclusion that Israel is in compliance with the requirement of proportionality provided in international humanitarian law, especially in view of the extensive steps that it took recently in order to restrict the effects of the naval blockade and the land crossings policy on the population of the Gaza Strip.[363]

International human rights law and its application in our case

98. As mentioned above, as with many other contemporary questions concerning the implementation of international humanitarian law, an examination of the interface between these rules and international human rights law is required. In the *Wall* case, the International Court of Justice recognized that international human rights law, which includes political and civil rights and economic, social and cultural rights, continues to apply during an armed conflict.[364] Nonetheless, it is not always clear to what extent these rights apply, especially where rules of international humanitarian law apply as a *lex specialis*.[365]

Before we begin the analysis, it should be noted that in the *Wall* case, the International Court of Justice also considered the application of two normative systems to a territory that it classified as an 'occupied territory.' In a situation of occupied territory, it is often considered that human rights law may be more readily applied than in other armed conflict situations. Indeed, while this report concludes that Israel no longer has effective control over the Gaza Strip, the analysis also discusses how various organizations and bodies continue to hold the position that Israel is an occupying power in the Gaza Strip. However, even in the context of occupation, questions have been raised as to whether the whole panoply of human rights law can or should be applied by an occupying state that clearly cannot act as the sovereign authority.[366] This issue is especially

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363 See *The Air and Missile Warfare Manual*, *supra* note 115, at art. 157(b), para. 3 (where it is stated that if an aerial blockade causes excessive suffering "blockade has to be lifted, *or free passage of foodstuffs and essential supplies is to be allowed*" [emphasis added].

364 See *the Wall* case, *supra* note 130, at paras. 102-107.

365 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. (Jul. 1996) para. 239-240, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=09&case=95 [hereafter: *Nuclear Weapons Case*].

366 See Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 Int'l L. Stud. 349, 375-376 (2010).

complex in the Gaza situation since the argument suggesting Israel is the occupying power has to address the existence of an entity, the Hamas, that carries out actual physical control over the territory, while Israel controls only the borders. Human rights groups have rightly noted that it is the Hamas, as the ruling power in the Gaza Strip, who is responsible for protecting the human rights of the Gaza residents, which includes "protecting the right to life, health, education, adequate living conditions and clean water."[367]

99. Since there are comprehensive and detailed rules in international humanitarian law regulating the imposition of a naval blockade, the question arises as to what extent the criteria of international human rights law should be taken into account. For example, the rules of the international humanitarian law dealing with a naval blockade, such as the prohibition of starvation or the prohibition of depriving the civilian population of objects essential for its survival and the question of the 'damage' or 'suffering' addressed in article 102(b) of the San Remo Manual, address the right to life, a right that also lies, of course, at the heart of international human rights law. From this viewpoint, the two normative regimes 'share a common "core" of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted.'[368] Since the right of the inhabitants of the Gaza Strip to life is addressed in the *lex specialis* that applies here, namely the rules of international humanitarian law, it is these rules that should primarily be applied.

100. Allegations have also been raised that Israel is in violation of international human rights law [369] because it restricts the movement of people to and from the Gaza Strip and thereby violates the right to

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367 *Gisha: Electricity Shortage in Gaza: Who Turned Out the Lights?*, *available at* www.gisha.org/UserFiles/File/publications/ElectricitypaperEnglish.pdf (2010).

See also *Testimony of Physicians for Human Rights*, *supra* note 244, at 19.

368 *Prosecutor v. Delalic*, Appeals Judgment, No. IT-96-21-A, para. 149 (Feb. 20, 2001) (Celebici case); see also Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239, 266-267 (2000).

369 See for example United Nations OHCHR: Human Rights Situation in Palestine and Other Occupied Arab Territories, ¶ 30, U.N. Doc. A/HRC/12/37 (Aug. 19, 2009), *available at* http://unispal.un.org/UNISPAL.NSF/0/71266F7CD47BBDEA85257615004D8635:
"The military operation and the continued blockade have had severe cumulative effects on the realization of a wide range of economic, social and cultural rights, as well as civil and political rights of the Gaza population".
See also *Consolidated Appeal*, *supra* note 219, at 8:
"Palestinians in the OPT continued to face widespread denial of their basic human rights, including the right to life, liberty, freedom of movement, self-determination and access to employment, health and education".

freedom of movement as stated in article 12 of the International Covenant on Civil and Political Rights (ICCPR).[370] In this respect, it should be noted that one of the legal conditions stipulated by the *lex specialis* regarding the imposition of a naval blockade is the condition of 'effectiveness'[371] and its impartial implementation with regard to the shipping vessels of all States.[372] Therefore, the concept of a 'naval blockade' inherently includes the restriction of all movement by sea. Moreover, the right of the citizens of one state to cross the borders of the state into another state with which they are at war is not unlimited. A state may, without doubt, restrict the freedom of movement of persons beyond its borders in order to protect national security and public order.[373]

Therefore, the Commission has reached the conclusion that most of the issues that were raised within this framework have already been addressed above pursuant to the *lex specialis* that applies here, namely the rules of international humanitarian law.

Further, there is nothing in the evidence that suggests that concerns raised regarding the realization of human rights norms would rise to a level that renders the naval blockade and the accompanying land closure contrary to international law because it is disproportionate.

Claims regarding 'collective punishment'

101. An issue that has to be addressed is whether the blockade and Israel's land crossings policy are a form of 'collective punishment' that is contrary to the rules of international humanitarian law. This is a very serious claim.[374] Under the circumstances, it is important to analyze the concept of 'collective punishment' to understand its basis in law and potential relevance to the case at hand.

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370 *Gisha: Gaza Closure Defined: Collective Punishment, Position Paper on the International Law Definition of Israeli Restrictions on Movement in and out of the Gaza Strip, available at* www.gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf (2008), at 10.

371 *San Remo Manual*, *supra* note 110, at rule 93.

372 *Id.*, at rule 100.

373 International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

374 Collective punishment is not enumerated as a war crime in Article 147 of Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 [hereinafter *Geneva Convention IV*]. However, while grave breaches of the Geneva Conventions are the most serious war crimes, other violations of international humanitarian law are also categorized as such. It is unclear whether the accusation leveled at Israel by certain parties - according to which the naval blockade amounts to a breach of international law - also implies that this constitutes a war crime.

102. The suggested basis in treaty law for this concept is found in article 33 of the Fourth Geneva Convention[375] and article 50 of the Hague Regulations of 1907, which prohibit the punishment of a protected person because of acts that he did not commit independently or for which he is not otherwise responsible.[376] This prohibition was also recognized in the First Additional Protocol and the Second Additional Protocol as a basic guarantee for all civilians and injured members of the armed forces that can no longer act as combatants (*hors de combat*).[377] Although collective punishment has been recognized as a war crime in the constitution of the International Criminal Tribunal for Rwanda and in the Special Tribunal for Sierra Leone,[378] it is not included in the list of crimes enumerated in the Rome Statute of 1998 of the International Criminal Court, unlike, for example, the crime of 'intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions', which is stipulated in article 8(2)(b)(XXV) of the Rome Convention.

103. The various commentaries of the International Committee of the Red Cross provide a particularly broad interpretation to the term 'collective punishment.' The Commentary to article 33 of Geneva Convention IV indicates that collective penalties refers not to sentences pronounced by a court but rather penalties of any kind inflicted on persons or entire groups for acts those persons have not committed. Similarly, the commentary on article 75 of the First Additional Protocol proposes that 'the concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.[379] Finally, the

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375 *Geneva Convention IV*, *supra* note 374, at para. 33, states the following:
"No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.
Pillage is prohibited.
Reprisals against protected persons and their property are prohibited".

376 The Hague Convention (1907), at para. 50, states the following:
"No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible".

377 See *Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, at 225, art. 33, para. 1.

378 See art. 4(b) of the International Criminal Tribunal of Rwanda (ICTR), "Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II" and art. 3(b) of the Statute of the Special Court for Sierra Leone.

379 See *ICRC Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, at 225, art. 75, para. 3055.

proposed interpretation of article 4(2)(b) in the Commentary on the Second Additional Protocol is that collective punishment "is virtually equivalent to prohibiting "reprisals" against protected persons" although such a prohibition is clearly found elsewhere in the law.[380] In this respect it should be noted that the case that is most often identified with the issue of collective punishment - the *Priebke* case - dealt with a conviction for acts of reprisal that were committed by German forces against Italian civilians during the Second World War.[381] The Commentary on the First Additional Protocol proposes that 'the prohibition [of collective punishment] is actually concerned with intimidation,'[382] even though attempts to extend the provisions to the use of physical and moral coercion have not been successful, since similar articles already exist with regard to prisoners of war and civilians.[383]

This is where the difficulty lies from the viewpoint of those who claim that imposing a naval blockade and adopting a method of economic warfare is 'collective punishment'; too broad an interpretation of the concept of 'collective punishment' can result in a conflict with additional and more specific provisions of international humanitarian law, such as the laws that govern the imposition of a naval blockade. A broad interpretation of what constitutes collective punishment has to be reconciled with both the nature of naval blockade as a lawful form of warfare and the specific customary law provisions regulating the conduct of such a blockade. If the customary rules regarding the imposition of a naval blockade are followed, it is difficult to see how this could constitute collective punishment.

104. Since one of the purposes of imposing a naval blockade is to use coercion against a hostile state or entity that is a party to an armed conflict, the affected population will generally feel the effects of this

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380 See ICRC Commentary on Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in Armed Conflicts (Protocol II), Jun. 8, 1977 [hereinafter *ICRC Commentary on Protocol II of the Geneva Conventions*], at para. 4536.

381 Sergio Marchisio, *The* Priebke *Case before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 1 Y.B. INT'L HUM. LAW 344, 350 (1998) (it should be noted that the Military Tribunal rejected the claim that the killings constituted "collective punishment" arguing that "according to the doctrine, collective punishment can affect only a community and not individuals: in that sense a classical example of collective punishment is the requisition of properties of the state such as libraries, museums, etc", see Francesca Martines *The Defences of Reprisals, Superior Orders and Duress in the* Priebke *Case Before the Italian Military Tribunal*, 1 YB OF INT'L HUM. LAW 354, 356 (1998)).

382 See *ICRC Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, at 225, art. 75, para. 3056.

383 *Id.*, at para. 3057.

pressure. The issue is not that there is coercive action which impacts the population collaterally, but rather what that impact is and what mitigating humanitarian measures are put in place. This reality is reflected in the assessment of economic sanctions even in situations that do not amount to an armed conflict. As the Economic and Social Council of the United Nations said in 1997:

> 'In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. For that reason, the sanctions regimes established by the Security Council now include humanitarian exemptions designed to permit the flow of essential goods and services destined for humanitarian purposes. It is commonly assumed that these exemptions ensure basic respect for economic, social and cultural rights within the targeted country.'[384]

The issue is not that there is coercive action impacting the population collaterally, but rather what that impact is and what mitigating humanitarian measures are put in place. Therefore, the fact that the fabric of economic life of the civilian population is adversely affected as a result of economic warfare does not, in itself, amount to 'collective punishment.'

105. When referring to 'collective punishment', a sharp distinction should be made in regards to two types of policy: (i) an authority punishes a group known to comprise innocent individuals, and (ii) an authority punishes a guilty individual, but in doing so, unintentionally or unavoidably causes a harmful effect upon innocent third parties. The second policy is accepted in the humanitarian legal system as long as the effect is not disproportionate compared to the military advantage. The key issue is therefore whether harm is intentionally directed at the civilian population or an unintended outcome.[385] For example, the Special Court for Sierra Leone has provided that the elements of the crime of collective punishments include "the intent on the part of the perpetrator to indiscriminately and collectively punish the persons for acts which

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384 See *CESCR, Comment 8*, *supra* note 343, at 2, para. 4 (the report then went on to indicate that the exemptions do not have the desired effect prompting recommendations for reform).

385 In terms of analyzing the alleged "collective punishment" as a war crime, it should be noted that criminal responsibility generally requires a mental element. The principle that criminal responsibility cannot be incurred without the requisite intent can be derived from Article 30 in the ICC Statute, which provides that a person should be liable for a crime only if the material elements are combined with intent and knowledge.

form the subject of the punishment."[386] Another example is article 51(2) of Additional Protocol I, which prohibits "acts or threats of violence the ***primary purpose*** of which is to spread terror among the civilian population [emphasis added]."

106. As to the effects of the blockade and the land crossings policy on the civilian population in the Gaza Strip, there is no doubt that the economic warfare Israel carries out with an intention of weakening the Hamas has an adverse impact on the daily life of the civilian population in Gaza. However, a number of the restrictions identified as evidence of the alleged collective punishment are imposed for a security reasons (i.e. restrictions on materials such as concrete and certain medical supplies that can have a military use).[387] Further, consistent with its obligations under international humanitarian law, Israel has set up a system for monitoring and coordinating humanitarian aid in Gaza in order to alleviate those effects.[388] There is nothing in the evidence, including that found in the numerous humanitarian and human rights reports, that suggest that Israel is *intentionally* placing restrictions on goods for the sole or primary purpose of denying them to the population of Gaza.

107. As for the naval blockade itself, within the framework of the rules that govern the imposition and enforcement of such a blockade, there is no basis for an allegation of 'collective punishment.' There is nothing in the Red Cross' Customary International Law Study that in any way connects the idea of 'collective punishment' with a naval blockade or siege warfare. On the contrary, the Study states that 'the prohibition of starvation as a method of warfare does not prohibit the imposition of a naval blockade as long as the purpose is to achieve a military objective and not to starve a civilian population.'[389] Similarly, with regard to a siege, which is another coercive method of warfare, the Red Cross' Customary International Law Study reiterates the fact that the prohibition of starvation as a means of warfare does not automatically prohibit a siege as long as the purpose is to achieve a military goal rather than the starvation of the civilian population.[390] It is hard to reconcile these statements with the notion that the naval blockade on the Gaza Strip, even when considered in conjunction with the border policy, falls within the meaning of collective punishment.

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386 *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-2004-16-T, Trial Chamber Judgment, para. 676 (Jun. 20, 2007).

387 *Prime Minister's Open Door Testimony*, *supra* note 82, at 25; *Leader of the Opposition Tzipi Livni's open door testimony*, *supra* note 177, at 12; *The Military Advocate-General's testimony*, *supra* note 98, at 60.

388 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 38.

389 Customary International Humanitarian Law, *supra* note 146, at 189.

390 *Id.*, at 188.

There is nothing on the facts that would suggest either operation was put into effect as a reprisal or directed at the civilian population.[391]

In conclusion, the Commission is of the view that the imposition and enforcement of the naval blockade and the land crossings policy on the Gaza Strip do not constitute 'collective punishment' of the civilian population.

Means of resolving disputes regarding the legality of a naval blockade

108. Even if the naval blockade against the Gaza Strip had been considered not to meet the requirements of international law, individuals or groups do not have the right to takes the law into their own hands and breach the blockade. Individuals or groups do not have the right to exercise unlimited "self-help" measures in the face of state authorities. This could result in the eventual justification of uses of force *external* to the realm of the U.N. Charter.

109. Moreover, the claim that neutral shipping is free to ignore the existence of a naval blockade for the reason that it *prima facie* breaches the provisions of article 102 of the San Remo Manual amounts to a claim that the blockade - an act of a sovereign state - is null and void. The Commission is of the opinion that the cases in international law where acts of a state are regarded as void - as opposed to illegal or unjust - are rare. In general, it is possible that the actions of a state that amount to a violation of 'the binding norms of international law' (*jus cogens*) will be defined as void *ab initio* and therefore they may be ignored. This is clearly the content of international treaties,[392] and it may be deduced from the International Law Commission's Draft Articles on State Responsibility, in cases where there is a gross violation of *jus cogens* norms.[393] Admittedly, there is some degree of consensus on the question of the content of *jus cogens* norms, but these norms are not authoritatively enumerated. The notes to the International Law Commission's Draft Articles, which is a non-exhaustive list, mention the prohibitions of aggression, slavery, genocide, racial discrimination and Apartheid, torture and the right to

391 See *ICRC Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, 225: "Reprisals are measures contrary to law, but which, when taken by one State with regard to another State to ensure the cessation of certain acts or to obtain compensation for them, are considered as lawful in the particular conditions under which they are carried out".

392 Vienna Convention on the Law of Treaties. May 23, 1969, 1155 U.N.T.S. 331, article 53.

393 Id.; Int'l L. Comm'n [ILC], *Draft Articles on Responsibility for Internationally Wrongful Acts, with Commentaries*, 2 Y.B. INT'L L. COMM'N (2001) articles 40-41 [hereinafter *ILC Draft*].

self-determination.[394] In the case at hand case, there is no basis for saying that these norms have been violated.

110. The rules that govern the imposition of a naval blockade, as reflected in leading naval manuals, as well as in the San Remo Manual, contains norms designated to protect the interests of three groups: the blockading party; neutrals; and the population of the blockaded state or entity. Among the norms protecting neutrals' interest are the requirements that a blockade be declared;[395] specified;[396] effective;[397] impartial;[398] and that it must not bar access to ports of neutral states.[399] These requirements protect mostly the reliance interest of neutral powers and vessels. The interests of the population within the blockaded territory, conversely, are protected in the aforementioned article 102.

Furthermore, in the situation at hand, it is indisputable that the vessels were offered to deliver the aid into Gaza through the Ashdod port, pending security inspection and under the supervision of relevant and impartial international agencies. Thus, and *in the relation* between the blockading power and the neutral vessels, Israel has acted according to the provisions of article 103 of the San Remo Manual. Therefore, even were we to accept, *arguendo*, that a neutral shipping vessel has a right to breach a naval blockade because it is disproportionate, in the specific circumstances of the case before us, it can be said that the illegality was repaired by Israel's offer to transfer the humanitarian supplies to the Gaza Strip, which was transmitted to the shipping vessels that participated in the flotilla. In truth, the attempt to breach the blockade could not have had any other purpose than a political one. The Commission is convinced that a political purpose in itself cannot give a shipping vessel the right to breach the blockade.

111. Therefore, the Commission finds that there is no basis to the claim that international law grants individuals or groups the liberty to disregard a declared, specified, effective, and impartial blockade - meaning, one that fulfills its obligations *vis-à-vis neutrals* - solely on counts of its view of the alleged violation of obligations *vis-à-vis* the *entity subject to the blockade*. Such an approach can lead to chaos in the relations between states and between states and individuals.

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394 *Id.*, at paras. 3-4.
395 *San Remo Manual*, *supra* note 110, at rule 93.
396 *Id.*, at rule 94.
397 *Id.*, at rule 95.
398 *Id.*, at rule 100.
399 *Id.*, at rule 99.

Chapter A: Conclusions

112. Here we shall summarize the conclusions that the Commission has reached in this part of the report:

- The conflict between Israel and the Gaza Strip is an international armed conflict.
- Israel's 'effective control' of the Gaza Strip ended when the disengagement was completed.
- The purpose of the naval blockade imposed by Israel on the Gaza Strip was primarily a military-security one.
- The naval blockade was imposed on the Gaza Strip lawfully, with Israel complying with the conditions for imposing it.
- Israel is complying with the humanitarian obligations imposed on the blockading party, including the prohibition of starving the civilian population or preventing the supply of objects essential for the survival of the civilian population and medical supplies, and the requirement that the damage to the civilian population is not excessive in relation to the concrete and direct military advantage anticipated from the blockade.
- The imposition and enforcement of the naval blockade on the Gaza Strip does not constitute 'collective punishment' of the population of the Gaza Strip.
- International law does not give individuals or groups the freedom to ignore the imposition of a naval blockade that satisfies the conditions for imposing it and that is enforced accordingly, especially where a blockade satisfies obligations to *neutral parties*, merely because in the opinion of those individuals or groups it violates the duties of the party imposing the blockade vis-à-vis *the entity subject to the blockade*.

Chapter B: The actions undertaken by Israel to enforce the naval blockade on May 31, 2010

General

113. On May 31, 2010, a flotilla of six ships whose stated destination was the Gaza Strip approached the coast of the State of Israel. During May, the six ships of the flotilla left the ports of Ireland, Turkey and Greece, and they joined together at a meeting point approximately 30 miles south of Cyprus.[400] The largest of the ships in the flotilla was the *Mavi Marmara*, which started out from the port of Istanbul and picked up most of its passengers at the port of Antalya; it had approximately 590 passengers and crew on board, who were primarily of Turkish nationality.

Reports about the organization of the flotilla began at the end of January and the beginning of February 2010. The IDF's assessment was that this flotilla was different from those that preceded it, since from the initial information that it received, it transpired that the flotilla would be particularly large; both in terms of size (there was talk of approximately ten ships), and the quantity of passengers and equipment that the various ships could carry. Israel therefore made preparations, both from a diplomatic viewpoint in order to prevent the departure of the flotilla from the ports of origin, and from a military viewpoint, in order to enforce the naval blockade and prevent the flotilla from reaching the Gaza Strip. The

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400 In fact, eight vessels departed with the purpose of joining up and reaching Gaza together. Two vessels were detained along the way for various reasons and it was decided not to wait for them: one of the vessels, the CHALLENGER 2, did not take part in the flotilla due to a technical malfunction and some of its passengers transferred to the *Mavi Marmara*'s deck, see para. A of *IDF completion response* (Nov. 15, 2010), the folder containing the exhibit has been marked by the Commission as folder 145 [hereinafter *IDF completion response of 15.11.2010*]; the second vessel, the Rachel Corrie, tried to reach the Gaza Strip at a later stage, following the events of the flotilla in question. The ship reached Israel's shores on Jun. 5, 2010 and after it was requested to stop by the IDF it was offered to unload its cargo at the port of Ashdod and that the merchandise on board would be transferred to Gaza following inspection, through the land border crossings and this was the case, see decision 1759 of 32nd Government Treatment of Rachel Corrie Flotilla to Gaza (Jun. 6, 2010) as well as the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 15.

diplomatic efforts were unsuccessful, and, consequently, the flotilla set sail with six ships as noted.

Shortly before the flotilla reached the coast of Israel, several warnings were sent to the ships, which stated that the ships were approaching the area of a naval blockade and they were requested to turn back. The warnings also stated that insofar as the ships did not comply with this instruction, the Israeli navy would adopt all of the measures at its disposal in order to enforce the naval blockade, and each of the warnings also stated that after security inspection, it would be possible to send the humanitarian cargo on board the ships to the Gaza Strip via the land crossings. When the ships reached a distance of approximately 70 miles from the coast of Atlit and still did not respond to the warnings, a military operation was started at 4:26 a.m. to take control of the ships with forces of the Shayetet 13 unit fast-roping from helicopters and boarding the ships from Morena speedboats of the Israeli navy (a Morena speedboat is a vessel for carrying servicemen that is made in the United States, where it is called RHIB for rigid-hulled inflatable boat, is used by the American special forces, and is characterized by advanced maneuvering capabilities and reaching high speeds; hereafter: **Morena speedboats**). On the deck of the *Mavi Marmara,* the IDF soldiers were met with extreme violence. The events that followed led to the deaths of nine of the participants of the flotilla, injuries to fifty-five others and injuries to nine IDF soldiers. On the decks of the other ships, the IDF soldiers encountered less or no resistance, and there were no loss of lives.

After the takeover of the ships was completed, the injured were taken to the various hospitals, and the bodies of the dead were taken to the Abu Kabir Forensic Institute, where only an external examination was carried out, and they were transferred to Turkey, at Turkey's request, without autopsies being performed. The ships and the other participants of the flotilla were taken to Ashdod port, where they began to arrive on May 31, 2010, at 1:00 p.m. The disembarking of the participants of the flotilla from the ships continued until around 9:45 a.m. on June 1, 2010. At Ashdod, the participants of the flotilla underwent a process that included a security check, issuing a detention order (in the language of each of the participants of the flotilla), and a medical examination, and some of them underwent the taking of biometric measurements (the taking of fingerprints and a photograph). Subsequently, the participants of the flotilla were transferred to several prisons where they were detained. On June 2, 2010, after the Attorney-General decided to terminate the criminal investigation that he had ordered on June 1, 2010, and after the approval of the Supreme Court was given in this regard, the participants were

taken to Ben-Gurion Airport and flown to the countries from which the flotilla set sail.

114. This chapter will address in depth the events of May 31, 2010 (i.e., the preparations that preceded these events, the events themselves and the grave consequences of these events). In the first part of this chapter, we will review in greater detail the factual sequence of events of the operations carried out by Israel to enforce the naval blockade of May 31, 2010, as revealed by the materials assembled by the Commission and the testimonies heard before it. First, we shall address the stage of the Israeli preparation before the arrival of the flotilla, both from the diplomatic and security viewpoint. Next, we shall consider the details of the military operation itself. Naturally, we will devote most of the analysis to examining the process of taking over the *Mavi Marmara*. The Commission will also examine, albeit in brief and to the extent required for deciding the issues before it, the identity of the participants of the flotilla and their actions during the stage of preparing for the flotilla and during the flotilla itself. We shall also present the questions that we posed during the course of the Commission's work, which shall be answered in this report.

Subsequently, we shall also address the laws that apply to the issues before the Commission, pursuant to international law. The legal discussion will be divided into a number of parts. As noted above, (see paras. 31-36), the laws applicable to enforcement of a naval blockade are the laws of naval warfare found, primarily, in the San Remo Manual. Also relevant are the laws and principles of customary international law. In this chapter, we will address the right to employ force in order to enforce a naval blockade. In this context, as we discuss at length below, it is important to distinguish between the use of force intended *to stop a vessel* and the use of force directed at *specific persons* aboard the vessel.

In the first three parts of the analysis in this chapter, we discuss the laws applicable to the "capture" of a vessel when enforcing a blockade. In the fourth part of this chapter, we discuss the issue of whether the force employed against the people on the *Mavi Marmara* was consistent with international law. This discussion requires a detailed analysis of the laws concerning the status of the flotilla participants under international humanitarian law. In the fifth part of this chapter, additional considerations related to the rules of engagement issued for the IDF operation will be presented. In the sixth part, we outline a number of factual and legal factors that are relevant when assessing the use of force and provide a general assessment of the use of force by the IDF soldiers

during the takeover operation, including their use of both lethal and less-lethal weapons.

In the seventh part (paras. 227-234), we present the conclusions of the detailed analysis conducted by the Commission with respect to each instance of the use of force in this event. As stated above, the Commission approached the IDF and requested the testimonies of all of the soldiers and commanders who used forced during the takeover of the vessels. These statements were analyzed by the Commission pursuant to the principles of international law.

Finally, in the eighth part of this chapter, we examine the planning and organization of the military operation in general, as well as the training and preparations for it that were undertaken by the IDF soldiers, with the goal of determining the extent to which these preparations influenced the use of force during the events under consideration.

The facts

The preparation stage

The situation before the operation from an intelligence perspective

115. At the beginning of this part, we shall present an overview of the intelligence that the political echelon and the IDF had in their possession before the 'Winds of Heaven 7' operation began. Within this framework, we shall provide some of the details that were known before the operation began and on the basis of which the preparations for it were made.[401]

116. In March 2010, naval intelligence in the IDF began to produce intelligence information with regard to the flotilla.[402] In view of initial public information about the organization of the flotilla that began to appear at the end of January 2010, intelligence items were published on March 4, 2010, with regard to the involvement in the flotilla of an organization

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401 It should be mentioned that information gathering sources in addition to the ones mentioned below dealt with gathering an intelligence picture of the event. See for example Gilad Cohen "The Flotilla to Breach the Siege on Gaza" (May 17, 2010), the folder containing the exhibit has been marked by the Commission as folder 28.

402 See " Winds of Heaven 7" (General Staff experts inquiry by Giora Eiland, Jul. 11, 2010), at 29, marked by the Commission as exhibit 5 [hereinafter *The Eiland Report*]; for intelligence compilations see " Winds of Heaven 7 - presentation of combat plan principles" (summary by IDF operations branch, October 2010) marked by the Commission as exhibit 106 [hereinafter *Operations Branch Summary*]; *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendixes 35-37, 43-45, 49.

called Insani Yardim Vakfi, or Humanitarian Relief Foundation in English (hereafter: **IHH**), a Turkish organization that is prohibited in Israel by law. Additional naval intelligence information concerned the number of participants in the flotilla, the agreement of human rights activists and public figures to participate in the flotilla, the dates planned for the departure of the flotilla, and statements of its organizers that they attached great importance to the involvement of the Turkish government, they intended to create a media event in real time and they were aware of Israel's intention of stopping the flotilla from reaching Gaza and their ambiguity regarding their response to such an operation by Israel.[403] On May 26, 2010, the intelligence included a statement attributed to the prime minister of Turkey that any step that would be taken in order to prevent the flotilla from reaching Gaza would lead to a response whose nature was unclear. On May 29, 2010, intelligence was published that the chairman of IHH, Bülent Yildirim, who was on the *Mavi Marmara* itself, said that the participants of the flotilla did not have any weapons in their possession, but they intended to resist any takeover of the ship by force. It was also reported that there were divers on board the ship for the purpose of locating any damage to the ship. On May 30, 2010, intelligence was distributed to the effect that the ships in the flotilla had begun to move in the direction of the Gaza Strip and that, *inter alia*, the activists on *Boat 8000* intended to tie themselves with chains and start a hunger strike.[404] On May 30, 2010, at 10:45 p.m., a special intelligence report was written and distributed by Israeli naval intelligence, which stated that in the last few hours, the statements regarding an intention to use physical force to resist the takeover had increased, and that while the participants of the flotilla emphasized that there was no intention of using guns or knives, they had warned of spontaneous responses to the use of force against them and declared that 'it would be difficult' for the naval forces to board the ship.[405]

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403 *Id.*; on Apr. 6, 2010 it was stated that there is a possibility that the flotilla would be accompanied by Turkish vessels. On Apr. 26, 2010 the intention to create a media event in real time was mentioned, along with the extreme importance attributed by the flotilla organizers to the involvement of the Turkish Government. On May 23, 2010 it was mentioned that a day earlier, a demonstration with multiple participants was orchestrated by the IHH at Istanbul's port and that the flotilla organizers mentioned that they are aware of the Navy's intention to prevent the ships' arrival in Gaza, though they remained vague regarding their conduct when facing the IDF soldiers. On Feb 25, 2010 it was mentioned in the intelligence gathering that the organizations taking part in the flotilla have begun operating direct broadcasts via satellite and that the Marmara has entered the port of Antalya to collect passengers. On May 27, 2010 a compilation was published which mentioned that at the time it is unknown whether the passengers are preparing a backup plan to prevent our forces' takeover of the participating vessels.

404 *Id.*, in compilation of May 29, 2010.

405 See "telegram form for operation "Winds of Heaven 7" by the Naval Intelligence Division",

The research division of naval intelligence also distributed several documents, but this information was relatively sparse and did not change the intelligence picture.[406] Additional open intelligence material was published by the Intelligence and Terrorism Information Center of the Israel Intelligence Heritage & Commemoration Center (hereafter: **IICC**) back in January, 2010. A document published by IICC on January 19, 2010, mentioned Khatam Sawalha, a Hamas operative in Britain who led the campaign to break the blockade on Gaza and who is connected with the Turkish IHH organization, who said on January 17, 2010, on a site identified with Hezbollah, that 'a new convoy of aid would leave for Gaza by sea' and that this time (apparently unlike the incident that occurred in January 2010, in an attempt of one of the land convoys to enter Gaza via the Rafah crossing, during which a confrontation with the Egyptians developed), 'the confrontation would be directly against the Zionist enemy.'[407] A document dated April 7, 2010, mentioned the possibility that the organizers of the flotilla took into account a possible scenario of confrontations with the Israeli Navy, and that they intended to 'provoke Israel.'[408] On May 26, 2010, the IICC distributed a document outlining the character of IHH and indicating the organization's links with Islamic extremists, including the Hamas and international Jihadists. The report discussed how the IHH was an organization with a radical Islamic orientation that had relations with the Hamas, *inter alia* through its membership of the 'Union of Good Coalition' (an umbrella organization of more than fifty Islamic funds around the world that transfer money, *inter alia*, to the Hamas) and that helped Hamas's propaganda machine in Turkey.[409] A document was distributed on May 30, 2010, in which Bülent Yildirim was quoted as saying, while on the *Mavi Marmara*, that the youngest person on the *Mavi Marmara* was one year old, and the

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the folder containing the exhibit was marked by the Commission as folder 90.

406 See *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendixes 36, 43. On Apr. 14, 2010 a general notice regarding the organization of a humanitarian flotilla was made public. The flotilla organizers' preparation for a confrontation with IDF forces which would be covered by the media was mentioned on May 16, 2010. Two more documents were distributed in internal distribution only (that is, the documents only circulated within the research department itself): a document dealing with the activities of the IHH organization was published on May 24, 2010. The document discusses the organization's activities as a non-governmental organization intended to aid Muslim communities throughout the world. On May 26, 2010 a document was distributed which mentioned the statement attributed to Turkish Prime Minister Recep Tayyip *Erdoğan that steps undertaken to halt the flotilla would meet with a reaction.*

407 See *IICC report* (Jan. 19, 2010), *supra* note 83, at 5; *IICC report* (Jan. 31, 2010), *Id.*, at 1; *IICC report* (Apr. 7, 2010), *Id.*, at 3.

408 *IICC report* (Apr. 7, 2010), *Id.*, at 3.

409 *IICC report* (May 26, 2010), *Id.*; see also identical report distributed on May 27, 2010.

oldest were eighty years old, and that although their resistance would not be violent, they would not allow Israeli forces to board the ship.[410] The document also said that the organizers of the flotilla expressed their desire that the conflict with the Navy would take place in daylight so that the media could document it and in order to create waves in the international media.[411] Additional reports which were distributed relate mostly to humanitarian aid issues, the equipment that the organizers of the flotilla intended to bring to the Gaza Strip, and the public figures and activists that would take part in the flotilla.[412]

The Mossad was asked by Israeli Naval Intelligence to send it information, which it did.

On May 11, 2010, a report was received from the National Security Council that according to a report in the Palestinian media, the prime minister of Turkey, Recep Erdogan, met with the organizers of the flotilla and said 'removing the blockade was top of Turkey's priorities.'[413]

Decision of the political echelon

117. As a rule, 'Winds of Heaven' operations - a procedure that was formulated by the IDF in order to deal with the phenomenon of flotillas to Gaza[414] - were approved by the political echelon, namely the Prime Minister and the Minister of Defense. In the course of formulating the plan for the 'Winds of Heaven' operation, the IDF had considered various alternatives for seizing the vessels, and the possibilities for performing a "cold stop" of the vessels had proven to be impractical. However, the navy had been successful in stopping ships by taking control of them, whether by climbing aboard their decks from small boats that came alongside the ships, and by rappelling from a helicopter directly onto the deck or the bridge (a drill called "fast-rope").

Therefore, on April 22, 2010, a discussion was held on the question of the flotilla which is the subject of this report, against a background of

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410 *IICC report* (May 30, 2010), *Id.*, at 2, which references the IHH organization's official website. See also *The Eiland Report*, *supra* note 402, at 32.

411 See *IICC report* (May 30, 2010), *supra* note 83, at 2, which references a news story on Al Jazeera from May 29, 2010 as well as an interview on the IHH organization's open channel from May 30, 2010.

412 See, for example *IICC report* (May 11, 2010) *Id.*; See also *The Eiland Report*, *supra* note 402, at 32.

413 See *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix 39.

414 See paras. 24-27 above in this report; see also ""Winds of Heaven" - General Staff Plan", in response to the completion request of Dec. 29, 2010, the folder containing the exhibit was marked by the Commission as folder 167 [hereinafter *The General Staff Plan*].

intelligence surveys that were prepared, at the weekly meeting that took place at the office of the Minister of Defense with the participation of IDF officers.[415] The IDF's position at the meeting was that if the diplomatic effort to prevent the flotilla setting sail was unsuccessful, there would be no alternative but to prevent the flotilla from reaching the Gaza Strip in a military operation, which would require taking control of the ships. At an additional meeting that took place on May 6, 2010, the Minister of Defense approved the overall format of the operation, even though he gave instructions that the preparations for the flotilla should be submitted for the approval of the Prime Minister, together with the Minister of Public Security, the Minister of Foreign Affairs, and the Minister of the Interior.[416] At the meeting that took place on May 13, 2010, the operation order was presented to the Minister of Defense.[417]

On May 26, 2010, the Prime Minister, Mr. Benjamin Netanyahu, raised the issue of the flotilla for discussion in the forum of the 'Septet' (an inner cabinet that includes the senior political-security echelon and persons with experience in these fields).[418] This discussion was not planned in advance. The ministers that participated in the discussion supported preventing the flotilla from reaching the Gaza Strip. At the end of the discussion, the Prime Minister asked the Minister of Defense to concentrate upon the inter-ministerial preparations and the preparations of all of the parties in the operation, as a result of his expected trip abroad a short time after that meeting.[419]

On the same day, a meeting took place at the office of the Minister of Defense with representatives of various entities and Government ministries that were involved in the preparations for the operation, including the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Public Security, the Ministry of Justice, IDF officers and public relations personnel.[420] At this meeting, the Commander of the Israel Navy reviewed the preparations of the forces for the operation. An additional meeting that took place at the office of the Minister of Defense on the same day addressed the issue of public relations in the context of the

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415 *Defense Minister's Memorandum*, *supra* note 176, at 32-34.

416 *Id.*, at 34-35.

417 *Id.*, at 35.

418 "Discussion regarding preparation for the flotilla to Gaza" (Protocol of septet forum meeting, May 26, 2010).

419 *Id.*, at 45.

420 See summary of meeting at Defense Minister's office "Preparation and Readiness of Forces for "Winds of Heaven" - Defense Minister's Summary" (May 26, 2010); protocol of meeting ""Winds of Heaven" - Part A", the folder where the exhibits are found was marked by the Commission as folder 28. See also *Defense Minister's Memorandum*, *supra* note 176, at 53.

preparations and deployment for the operation.[421] Following this, on May 27, 2010, the Ministry of Foreign Affairs sent a document to all of Israel's representations abroad.[422] On May 27, 2010, at a weekly update meeting that took place at the office of the Minister of Defense, the Minister of Defense said that he was impressed by the high level of preparation of the forces and entities for dealing with the flotilla, discussed the expected confrontation with the flotilla activists and the public relations difficulty presented by the incident.[423]

The diplomatic attempts to prevent the flotilla from departing

118. From the materials before the Commission, it can clearly be seen that during the period before the flotilla set sail, many diplomatic moves were made, at various levels and to various countries, in order to prevent the flotilla's departure for Gaza.

Thus, for example, the Prime Minister, Mr. Benjamin Netanyahu, said in his testimony before the Commission that in view of the expected scale of the flotilla, a 'special diplomatic effort' was made to try to prevent it from reaching the Gaza coast and to divert it to Ashdod or the El-Arish port where it would unload the humanitarian equipment and transport it via the land crossings.[424] The Prime Minister went on to say that in May diplomatic moves were made continuously to many countries, including countries whose citizens were on board the vessels in the flotilla, or whose ports were used at any stage by the vessels in the flotilla. The Prime Minister further said that diplomatic efforts were also made to the United Nations and Turkey, since many of the flotilla's participants were Turkish citizens. In this context, the Prime Minister said that his office made direct contacts with 'the highest levels of the Turkish Government,' including Turkish Prime Minister, Recep Erdogan, himself; moreover, the Prime Minister said that on May 27, 2010, he personally contacted a senior figure in the Egyptian Government, with a request that Egypt would speak with the Turkish Government.[425] In his classified testimony before

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421 See summary of meeting at Defense Minister's office ""Winds of Heaven" - Publicity - Defense Minister's Summary" (May 27, 2010); protocol of meeting "“Sky Winds” - Part A", the folder where the exhibits are found was marked by the Commission as folder 28; See also *Defense Minister's Memorandum*, *supra* note 176, at 53.

422 Announcement by the Foreign Office spokesperson to Israeli representatives (May 27, 2010), *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix 60/2.

423 See protocol of weekly situation estimate at Defense Minister's office "Operations and Excursions + weekly Situation Estimate" (May 27, 2010), the folder where the exhibits are found was marked by the Commission as folder 28; see also *Defense Minister's Memorandum*, *supra* note 176, at 54.

424 *Prime Minister's Open Door Testimony*, *supra* note 82, at 8.

425 *Id.*, at 9.

the Commission, the Prime Minister gave precise details of the nature and timing of the diplomatic moves.[426] Despite these actions, the Prime Minister ended by saying that 'All the efforts led to nothing.'[427]

The Minister of Defense, Lieutenant-General (res.) Ehud Barak, also testified regarding the diplomatic moves that were intended to prevent the flotilla from setting sail:

> 'Throughout the aforesaid period, there was extensive diplomatic activity on the part of the Prime Minister, the Ministry of Foreign Affairs, senior officials in the Ministry of Defense and the IDF and also by me, in an effort to bring about the cancellation of the flotilla, to stop it or limit it. In the two weeks prior to the arrival of the Turkish flotilla, I discussed the matter with the representative of the Quartet, Tony Blair, the envoy of the UN Secretary-General, Robert Serry, the head of Egypt's General Intelligence, the Greek Foreign Minister, the Turkish Foreign Minister, the Irish Foreign Minister, the Turkish Ambassador in Israel and several others who, because of the nature of their diplomatic contacts requested that their names should not be mentioned. Regrettably, these major diplomatic efforts did not lead to the result that we wanted.'[428]

In his classified testimony, the Minister of Defense went on to give details of the diplomatic contacts with Turkey immediately before the flotilla set sail in an attempt to prevent its departure. Here, he discussed the diplomatic contacts with the Turkish representatives in the United States, with senior officials in Egypt, Cyprus and the United States, and with senior officials in the Turkish Government itself.[429]

Additional details of the purposes, nature, and dates of the diplomatic contacts were given to the Commission in the testimony of the former director-general of the Ministry of Foreign Affairs, Ambassador Yossi Gal. In his testimony, the director-general of the Ministry of Foreign Affairs discussed how during the whole period of the diplomatic efforts Israel emphasized time and again the existence of the naval blockade and the fact that, as a rule, Israel does not prevent the entry of humanitarian equipment into Gaza, subject to a security inspection at the land crossings.[430]

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426 Transcript of session no. 2 "Testimony of the Prime Minister, Close doors" (Aug. 26, 2010) [hereinafter *Prime Minister's Closed Door Testimony*].

427 *Prime Minister's Open Door Testimony*, *supra* note 82, at 9.

428 *Defense Minister's Open Door Testimony*, *supra* note 70, at 43-44.

429 Transcript of session no. 3 "Defense Minister's Closed Door Testimony" (Aug. 10, 2010), at 7-8, marked by the Commission as exhibit 85 [hereinafter *Defense Minister's Closed Door Testimony*].

430 Transcript of session no. 10 "Testimony of the Director General of the Ministry of Foreign Affairs" (Sep. 15, 2010), at 5, 7, [hereinafter *Open Door Testimony of the Director General of the*

The director-general of the Ministry of Foreign Affairs described in his testimony the scope of the contacts that were made with representatives in various capitals (including Washington, Nicosia, Athens, Dublin, London, Stockholm and other capitals), contacts which, according to his testimony, began many weeks before the maritime incident and continued until a short time before the flotilla arrived.[431] He went on to say that at a meeting with ambassadors of the twenty-seven member states of the European Union on May 23, 2010, he raised the issue of the flotilla with them, and that even after this another round of approaches was made, in which diplomatic letters were sent to representatives of countries that were *prima facie* able to help.[432] The director-general of the Ministry of Foreign Affairs also said that shortly before the flotilla set sail, the ambassadors of the countries from which the flotilla ships departed were summoned by him and another message was sent to these countries. These efforts were not fruitful, except with respect to Cyprus, which announced in May that it would not permit the flotilla's vessels to anchor in its ports.[433]

The director-general of the Ministry of Foreign Affairs discussed in his testimony the intensive diplomatic activity that was directed at Turkey itself, at all levels and in all spheres.[434] The director-general of the Ministry of Foreign Affairs went on to describe in his testimony several proposals that were sent that were made between Israel and Turkey, including Israel's consent to the proposal of the Turkish ambassador to the United States (which was made to the Israeli Embassy in the United States) that it would be the Red Crescent that would receive the humanitarian equipment from it at the land crossings, but these proposals were also rejected.[435] The director-general of the Ministry of Foreign Affairs also said that the scale of the contacts with Turkey was exceptional. In his words:

Ministry of Foreign Affairs].

431 *Id.*, at 7.

432 See also letter from Gilad Cohen, Coordination manager, Foreign Ministry, to The Public Commission to Examine the Maritime Incident of May 31, 2010 (Nov. 22, 2010).

433 See "Concentration of Official Addresses to Cyprus and additional materials" submitted to the Commission by the Foreign Ministry, marked by the Commission as exhibit 60; see *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 14.

434 Transcript of session no. 10 "Close door Testimony of the Director General of the Ministry of Foreign Affairs (Sep. 15, 2010) [hereinafter *Closed Door Testimony of the Director General of the Ministry of Foreign Affairs*].

435 *Id.*; A document which testifies to this offer was sent by the Israeli ambassador to Washington D.C.'s office director, on Mar. 19, 2010, named subject: the Flotilla to Gaza, see letter from Lior Weintraub, Washington D.C. Ambassador's office director to the Director General of the Ministry of Foreign Affairs (Mar. 19, 2010), *Defense Minister's Memorandum Appendixes*, *supra* note 209.

> 'We tried every possible channel to prevent the flotilla from departing… In each of the very many conversations, the Minister of Defense and the Turkish Foreign Minister, from me to my Turkish counterpart, the embassies in Washington and Ankara, and all of the other contacts, there was a clear attempt to propose a solution for the ships, to propose a solution for the equipment on the ships, and at no stage was a positive response received.'[436]

It should also be noted that diplomatic efforts were also made by the military. The Commander of the Israeli Navy held a personal meeting with the military attachés of Turkey and Greece and wrote personal letters to the Commanders of their navies; senior officers held meetings with military attachés; a briefing was held with all IDF attachés, and so forth.[437] In the two weeks before the flotilla arrived, the Planning Division of the IDF also increased its involvement. The Liaison Department in the Planning Division began a series of discussions with various international organizations, including the Red Cross, UNIFIL (the United Nations Interim Force in Lebanon) and UNDOF (the United Nations Disengagement Observer Force that is stationed on the Israeli-Syrian border), as well as discussions with several countries, mainly Egypt and Jordan. The purpose of these was to prepare the way for the possibility that these countries would need to assist in receiving participants of the flotilla after they would be deported from Israel, and alternatively in dealing with any of the participants who is a citizen of a country with whom Israel has not diplomatic relations. The Planning Division also sent communications to all of the foreign military attachés in Israel and the IDF attachés abroad.[438]

The IDF's preparations for the 'Winds of Heaven 7' operation

119. The military preparations carried out by the IDF to enforce the naval blockade will be reviewed from two main perspectives: (1) the legal preparations, which were an integral part of the preparatory work prior to the operation; (2) the military preparations themselves, i.e., the operation order, the soldiers' briefings and the rules of engagement that were determined for the operation, with special attention to the importance attached to the value of human life in the preparations for the operation. It should be clarified that this chapter will not review all of the

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436 See *Closed Door Testimony of the Director General of the Ministry of Foreign Affairs*, *supra* note 434, at 15.

437 *The Eiland Report*, *supra* note 402, at 49; For details of military-diplomatic contacts see *Operations Branch Summary*, *supra* note 402.

438 *The Eiland Report*, *supra* note 402.

preparations for the operation, but only the aspects that are relevant to the questions before the Commission.

As can be seen from the material before the Commission, the IDF carried out preparatory work before the flotilla arrived, and it emphasized the need to avoid, insofar as possible, the use of force for the purpose of stopping the ships participating in it. It is clear that the Military Advocate-General's Office was very much involved in the preparation process and that its recommendations were noted and incorporated in the operation orders and the various procedures that were determined prior to the operation. We see from the documents and the testimonies a high level of awareness of all of the persons involved, at all levels, of the need to carry out the operation without any injuries to the participants of the flotilla. However, it should be noted that we see from the material before the Commission that the level of violent resistance on the part of the flotilla participants that was anticipated by the IDF prior to the operation was clearly underestimated.

120. *The legal preparations.* As noted in chapter A, the use of a naval blockade in order to give the IDF all of the tools and powers required to prevent the passage of ships to the Gaza Strip was recommended by the Military Advocate-General back in 2008, when the preparations for the 'Winds of Heaven 1' operation began. In that context, the Military Advocate-General requested the opinion of the Attorney-General.[439]

Within the context of the preparations for the 'Winds of Heaven 7' operation, we clearly see the involvement of the Military Advocate-General's Office in the planning process carried out by the Chief of Staff level and the Navy, in preparing legal opinions on various military issues, in formulating a legal annex for the operation orders and in coordinating the legal position with parties outside the IDF.[440] The opinions surveyed, *inter alia*, the authority the Navy could use vis-à-vis foreign ships off the coast of Gaza, the confiscation of ships pursuant to the laws of war in general, and because of a breach of the naval blockade in particular, procedures for dealing with humanitarian equipment that was seized on a ship that

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439 Letter from the Chief Military Advocate General, Brigadier General Avichai Mendelblit to the Government's Attorney General (Aug. 11, 2008); *The Eiland Report*, *supra* note 402, at 151.

440 See *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 51: "I think, but it must be clear that we, all the activity, from the stage of combat protocol, from the stage of planning, and throughout all the stages of the operation and its various stages, including questions that stemmed from execution and including preparation afterward, as a set method. By the way, and not in a special way, the Military Advocate General is integrated in into the operational planning components of the IDF, a day to day matter. They are part of our operational presentations. In the branches and in the General Staff".

breached a naval blockade, and so forth. Moreover, the Military Advocate-General's Office addressed the question of the use of less-lethal weapons during the operation, and it gave specific approval for the weapons that were used in the operation.[441] The Military Advocate-General's Office also addressed the question of imposing communications blackouts during the operation[442] and the issue of the IDF receiving assistance from

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441 See also *The Eiland Report*, *supra* note 402, at 152-163.
The Military Advocate General was the one that drew the attention of the relevant IDF authorities to the need to complete approval processes for the use of less-lethal weapons intended for use in the operation. As part of a discussion that took place on May 17, 2010 and which dealt with the use of less-lethal weapons within the "Winds of Heaven 7" operation, the representatives of MAG presented the legal framework for the use of the less-lethal weapons within the operation in light of the rules of combat and the three terms which must be met as a condition for employing such means, that is, the approval that such means are not lethal; determining of appropriate safety and operational rules for the situation where it is intended to be used; and the qualification of soldiers expected to make use of the means; see *MAG position paper - Appendix*, *supra* note 77; see also *The Eiland Report*, *supra* note 402, at 155-156.

442 On the specific level, MAG sources expressed their opinion that it is possible, within the operation, to make use of a number of means regularly employed by the IDF and the use of "paintballs" and "talc- balls" was ruled out. Sometime after the said discussion, the operational elements asked that the use of these two means be allowed, in order to enable a graded operation of less-lethal weapons (among the means approved in said discussion none of the means could have been employed against specific people unless employed at zero range, excluding the "soft bag". But this was a relatively aggressive means and so the operational elements preferred not to use it as a first means). On May 27, 2010 the MAG distributed a detailed opinion where the legality of employing these means was examined. In light of the Chief Medical Officer's position that the likelihood that the employment of these weapons, in accordance with the operational instructions determined, would cause an irrevocable or fatal injury is low, the use of these means was approved, while defining the rules of operation determined for them, the approval for their use by soldiers from specific units only, and an instruction to train the soldiers equipped with this weapon. At the same time it was mentioned that due to time constraints a formal professional order regarding the use of these weapons was not consolidated, nor was a formal professional order consolidated regarding the training of the soldiers, and that this is not the manner in which the process of receiving a less-lethal weapon into the IDF should be conducted. Therefore, approval was granted for the employment of these weapons within operation "Winds of Heaven 7" only and it was recommended that an organized process of receiving these means be set into motion. See summary of meeting headed by the Navy's Information Security Branch Head "Legal Aspects in the Issue of Using Less-Lethal Weapons in Operation 'Winds of Heaven 7'" (27.5.2010), Appendix 14 of the *MAG position paper - Appendix*, *supra* note 77.

On May 18, 2010 the Military Advocate General's Department of International Law released a first legal reference to the possibility of executing such blocks where it was mentioned that there is no fundamental legal hindrance in terms of international law from performing blocks / disrupting the specific communications detailed, excluding the blocking of Global Positioning Systems (GPS) broadcasts, regarding which it was mentioned that in the absence of a sufficient factual basis their legality cannot be questioned. The relevant legal appendix was also attached to the opinion regarding the various aspects of blocking communication. This appendix was attached to the legal appendix to the order, but not to the communication blocking appendix of

the Israel Prison Service and the Israel Police during the operation.[443] The Military Advocate-General's Office was also involved in formulating the final wording of the communications that were transmitted to the ships before they were taken over. The Military Advocate-General's Office also prepared a legal annex to the operation order that included rules of conduct for the forces, rules of engagement for the operation, and also rules for carrying out electronic screening measures, including an approved list of blackouts that could be implemented.[444]

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the order; see "Communication Blocks within Operation 'Winds of Heaven 7'" (MAG opinion, May 18, 2010), appendix 12 of the *MAG position paper - Appendix*, *supra* note 77. It should also be mentioned that on May 30, 2010 the Adalah organization approached the Government's Attorney General and the Chief Military Advocate General regarding the "electronic screening against the flotilla to Gaza." In the organization's letter a claim was raised that this screening was intended to prevent the broadcast of harsh images from the takeover of the flotilla vessels which could harm Israel's image and that, as far as this screening harms the ability to broadcast distress signals or hinders the ability to navigate, it constitutes a threat to the lives of the passengers on the ships. Following this, and at the request of the MAG, an urgent discussion was held with the participation of various elements in the Navy and headed by the Navy's Chief of Staff. In the discussion the operational capabilities of the Navy were presented regarding the blocking of the vessel's communication channels and the manner in which these capabilities are exercised during the operation. It was emphasized that throughout the operation the vessel's ability to move safely would not be hindered and that in case of distress a response would be given by a nearby Navy vessel. In light of these the MAG's Department of International Law released a response letter to the Adalah organization that same day where it was mentioned that there is no possibility to reveal the operational means and methods which will be employed by the IDF in its actions, but within the framework of employing the various means at the IDF's disposal, the "chief consideration is preventing the risk to human life at sea, and the possibility to call for help at times of distress." *The Eiland Report*, *supra* note 402, at 158.

443 In its opinion of May 17, 2010 MAG's Department of Consultation and Legislation stated that in its opinion there is no prevention from the Police and Prison Service forces assist the IDF in executing actions to enforce the blockade since the laws of war do not limit a state in the choice of armed forces participating on its behalf in the enforcement of the laws of war; see "Israeli Police and Prison Service Assistance to IDF During Operation 'Winds of Heaven 7'" (Opinion by the MAG, May 17, 2010), at appendix 11 of the *MAG position paper - Appendix*, *supra* note 77. In light of differences of opinion that had broken out between the MAG and elements in the Ministry of Justice and the Ministry of Defense regarding the incorporation of the Masada unit, a special unit of the Prison Service, the Chief Military Advocate General approached the Attorney General on May 24, 2010 in order to receive his legal approval to incorporate the Masada unit into the operation; see letter from the Chief Military Advocate General, Brigadier General Avichai Mendelblit to Attorney Yehuda Weinstein, Attorney General (May 24, 2010), at appendix 13 of the *MAG position paper - Appendix*, *supra* note 77. Said approval, based on the rules of combat, was given on May 26, 2010, but only in relation to actions executed outside Israel's territorial waters (while inside the territorial waters it was determined that Masada forces could only assist in escorting and guarding the ships' passengers); see letter from Attorney Raz Nizri, senior assistant to the Government's Attorney General, to attorney Benny Folchek, Prison Service Commissionership (May 26, 2010), at appendix 13 of the *MAG position paper - Appendix*, *supra* note 77.

444 See *MAG position paper - Appendix*, *supra* note 77, at appendix 14.

121. *The military preparations*. As previously noted, the IDF began its preparations back in February 2010, when it received the information regarding the steps taken to organize the departure of the flotilla. The Commission was provided with the operation orders of the Chief of Staff (command no. 1 and command no. 3), the naval command (no. 3), and the land command (no. 2), which were prepared by the IDF before the flotilla arrived.[445] The Commission also received the briefing that the Commander of the Navy gave to the commanders and soldiers on May 20, 2010, and a summary of the 'situation analysis' headed by the Commander of the Navy, which took place on May 26, 2010.[446]

The last Chief of Staff's operation order that was issued before the incident (hereafter: **the Chief of Staff's order**) defines the goal as follows: 'The IDF shall prevent unauthorized vessels reaching the Gaza Strip.'[447] The mission is defined as follows: 'The Navy shall enforce the naval blockade imposed on the Gaza Strip and shall prevent vessels from entering the Gaza Strip, while maintaining as low a media profile as possible.'[448] The Chief of Staff's order reviews the deployment of forces and the division of tasks and is it accompanied by seven annexes dealing with various issues, including the division of responsibility for dealing with the deportation from Israel of foreign nationals that participated in the flotilla, the seizure of equipment belonging to foreign nationals that are deported against a background of committing security offences, legal emphases and annexes that concern subjects such as operating electronic screening, IDF spokesperson's statements, teleprocessing and logistics. The annex that concerns the seizure of personal equipment belonging to the flotilla participants placed an emphasis on carrying out checks from the viewpoint of data security and states the competent authority to approve various actions with regard to the seizure of the equipment and its treatment.

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445 For the most updated command, see General Staff Operational Order 3 "Winds of Heaven 7 - Situation Room Order", in response to the completion request of Nov. 7, 2010, the folder containing the exhibit was marked as folder 136 by the Commission [hereinafter *General Staff Operational Order 3*]; Naval Operational Order 3 "Winds of Heaven 7", the folder containing the exhibit was marked as folder 90 by the Commission [hereinafter *Naval Operational Order 3*]; Land Operational Order 2 "Winds of Heaven 7", in response to the completion request of Nov. 7, 2010, the folder containing the exhibit was marked as folder 136 by the Commission [hereinafter *Land Operational Order 2*].

446 Summary of situation analysis headed by Navy commander 'Winds of Heaven' Situation Analysis May 26, 2010 - Navy Commander's summary" (May 26, 2010), the folder containing the exhibit was marked as folder 90 by the Commission.

447 *General Staff Operational Order 3*, *supra* note 445, at para. 5. See also para. 4 of General Staff Operational Order 1 "Winds of Heaven - Situation Room Order", *Defense Minister's Memorandum Appendixes*, *supra* note 209 [hereinafter *General Staff Operational Order 1*].

448 *General Staff Operational Order 3*, *supra* note 445, at para. 6.

The naval operation order defines the mission as follows: 'A combined force of Shayetet 13 with the assistance of "second wave" forces … will prevent the entry of shipping vessels into the Gaza Strip "Winds of Heaven 7" while maintaining legitimacy.'[449] The naval order is very detailed. We shall discuss here in brief certain aspects thereof that are relevant to our concerns, mainly from the viewpoint of the use of force and the treatment of the participants of the flotilla.

From the viewpoint of deploying the forces for the naval stage of the operation, it was decided that the command level would be very senior, including the Commander of the Navy himself.[450] In the naval stage, the force was divided into two types: (1) the takeover force, whose function was to take control of the ships if they would not respond to the radio communications. The takeover force was made up of three independent "centers", under the command of a senior commander holding the rank of lieutenant-colonel: "center A" was designated to take control of the *Mavi Marmara*, "center B" was designated to take control of *Boat 8000* and the *Gazze*, and "center C" was designated to take control of the *Challenger 1* and the *Sofia*. An additional force was designated to take control of the *Defne Y*. Each of these "centers" was intended to be completely independent at the operation stage; in other words, it was given its own independent medical personnel, navigators and reserves.[451] (2) The second wave force, which would be comprised of four teams commanded by lieutenant-colonels and whose tasks were: (a) to bring the flotilla vessels to Israeli ports; (b) to make a list of the persons on board and to deal with the magnetic media that would be found on board the vessels.

In the paragraph entitled 'details of the general method,' the order states that operations should be carried out to enforce the naval blockade according to an 'order of escalation - warning / prevention / bringing

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449 *Naval Operational Order 3*, *supra* note 445, at para. 4.

450 As part of the presentation of the operation's principles to the Chief of Staff prior to the operation, the Chief of Staff determined that the commander of the Navy is the commander of the operation. This instruction was given as part of the Chief of Staff's Operations and Excursions of May 6, 2010; see *IDF completion response of 15.11.2010*, *supra* note 400, at para. G. This instruction was incorporated into the orders, see *General Staff Operational Order 1*, *supra* note 447, at para. 8; *Naval Operational Order 3*, *supra* note 445, at para. 13. In addition, in Operations and Excursions summary of May 13, 2010, para. E, sub-para. 4 it is mentioned that: "The Chief of Staff stressed the importance of senior command's presence at the anticipated points of friction while conducting a sensitive and measured action - responsibility of the commander of the Navy." *IDF completion response of 15.11.2010*, *supra* note 400, at Para. G.

451 See the testimony of the commander of Shayetet 13, "Deepening and Broadening the General Staff 's experts inquiry (Sep. 20, 2010)", at 3, marked by the Commission as exhibit 104 [hereinafter *Inquiry Expansion of 20.9.2010*].

the vessels to a halt / taking control of them.' In the 'details of method' paragraph, under the operation stage dealing with 'identification, monitoring and sending messages to the vessels,' in the special instructions paragraph, it was stated that before the stage of taking control of the vessels and after receiving approval from the Navy Commander, the force commander was permitted to employ various measures to stop the vessels, including firing 'skunk bombs' or water from water cannons, forcing the vessels to change their course or stop by means of missile ships, crossing bows, firing warning shots into the air and 'white lighting' (blinding using a large projector).[452] The legal annex to the order contained legal emphases for the use of these measures and the manner of operating them. In this regard, it should be stated from the outset that in practice, no use was made of these measures.[453]

The following instructions, *inter alia*, are also outlined in the naval order:

a. Instructions regarding communications and warnings that would be transmitted by a loudspeaker system: according to the Navy's operation order, five communications were planned with ascending levels of warning as the flotilla vessels approached the area of the naval blockade. The language of the five communications, and the points at which it was determined they would be sent to the flotilla vessels, as stated in the Navy's operation order, were the following:

Communication no. 1 - first communication from the Government, intended for transmission at the time of interception (attached to the list of communications the day before the operation at the request of the Prime Minister):[454]

> 'This is the Israeli Navy. You are approaching an area of hostilities which is under a naval blockade. The Gaza area, coastal region and Gaza Harbor are closed to all maritime traffic. The Israeli government supports delivery of humanitarian supplies to the civilian population in the Gaza strip and invites you to enter the Ashdod port. Delivery of the supplies in accordance with the authorities' regulations will be through the formal land crossings

452 *General Staff Operational Order 3*, *supra* note 445.

453 See Transcript of session no. 13 "close door testimony of the Chief of Staff" (Dec. 24, 2010), at 14-15. The Chief of Staff mentioned in his testimony that "the order does not obligate the use of all the means. The order mentions all the means that may be used and the considerations regarding the employment of the means are in accordance with the situation, the missions […] there is no obligation to go through all the means, but the means suitable for the matter must be used". In this context, see explanation presented in para. 227 for the negation of the possibility of using some of the means discussed.

454 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. D.

and under your observation, after which you can return to your home ports aboard the vessels on which you arrived.'[455]

Communication no. 2 - intended for transmission at the time of interception:

'This is the Israeli Navy. You are approaching an area of hostilities which is under a naval blockade. The Gaza area, coastal region and Gaza Harbor are closed to all maritime traffic.

You are hereby requested to change your course and refrain from entering the area.

Delivery of humanitarian supplies to the civilian population in the Gaza strip is possible through the formal land crossing between Israel and the Gaza strip, subject to prior coordination with the Israeli authorities.'[456]

Communication no. 3 - intermediate communication:

'This is the Israeli Navy. You are approaching an area of hostilities which is under a naval blockade. The Gaza area, coastal region and Gaza Harbor are closed to all maritime traffic.

You are hereby ordered to change your course and refrain from entering the area. If you ignore this order and attempt to enter the blockaded area, the Israeli Navy will be forced to take all the necessary measures in order to enforce this blockade.

By ignoring this order, you are putting your crew members and your motor vessel at risk. You alone are responsible for the consequences of your action.

Delivery of humanitarian supplies to the civilian population in the Gaza strip is possible through the formal land crossings between Israel and the Gaza strip subject to prior coordination with the Israeli authorities.'[457]

Fourth communication - intended as a loudspeaker announcement before the vessels entered a range of 20 miles from the area of the naval blockade:

'This is the Israeli Navy. You are approaching an area of hostilities which is under a naval blockade. The Gaza area is a combat zone, by entering this zone you are putting your vessel at risk.

You are hereby ordered to change your course and refrain from entering the area. If you ignore this order and attempt to enter the blockaded area, the Israeli Navy will be forced to take all

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455 *Naval Operational Order 3*, *supra* note 445, at 54, appendix F.
456 *Id*.
457 *Id*., at 55.

> the necessary measures including boarding your vessel in order to enforce his blockade. Be aware that you are violating a legal naval blockade and that the organizers and captains of this sail will be held responsible.
>
> Delivery of humanitarian supplies to the civilian population in the Gaza strip is possible through the formal land crossings between Israel and the Gaza strip subject to prior coordination with the Israeli authorities.'[458]

Optional fifth communication - after entering the area of the blockade:

> 'This is the Israeli Navy. You are sailing in a blockaded area according to international law. You were ordered several times to avoid entering this area. Due to your refusal to obey this order and your intent to violate a legal naval blockade, the Israeli Navy is obliged to take all necessary measures in order to enforce this blockade. By ignoring this order, you are putting your crew members and your motor vessel at risk. If you do not change your course immediately, you alone will be responsible for the consequences of your actions.'[459]

b. The weapons that were permitted for use - the safety annex states that the combat personnel would be armed only in accordance with the instructions of the Military Advocate-General's Office and the instructions of the Chief Medical Officer's Office.[460] It was also decided that the commanders would ensure, after issuing the weapons, that the combat personnel would only have in their possession weapons that were permitted for use pursuant to these instructions.[461]

According to the operation order, the less-lethal weapons that were approved for use in the operation included the following:

(1) A Taser gun in the form of a shocker, without firing - a device that works like a shocker, by forming an electric circuit on the target from short range. Works on batteries. Type of ammunition: electric current.

(2) Remington 870 shotgun - a firearm that can be used, *inter alia*, as a less-lethal weapon. It is loaded manually, with a three shell internal tube magazine (in addition to one shell in the barrel). It is possible to attach sights and a device for breaking windows.

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458 *Id.*, at 56.
459 *Id.*, at 57.
460 *Naval Operational Order 3*, *supra* note 445, at 33, appendix C, para. 4(c)(1).
461 *Id.*, at 33, appendix C, para. 4(c)(4).

The ammunition that was approved for using this weapon was 12 gauge bean bag shells.[462]

(3) Tippman 98 paintball gun - a weapon that is designed to fill paintballs, with a semi-automatic firing capacity. It operates on the basis of a pneumatic mechanism that is operated by an air pressure canister of up to 2000 PSI. The ammunition that was approved for use in this weapon: 0.68 inch caliber paint balls.

(4) Stun grenade 4 - a stun grenade is a grenade that when detonated creates a flare up to a distance of 30 cm from its base (i.e. a "flash bang" grenade). Delay of 1.5 seconds. It was emphasized that grenades of this kind should be used without gas and without smoke.

The order's safety annex clearly emphasized that the use of less-lethal weapons or ammunition other than those that appear in the instructions was prohibited,[463] and they stated that all of the combat personnel would undergo training and drills with regard to instructions for the use of the weapons,[464] that live ammunition would be clearly separated from less-lethal ammunition and clear operating procedures would be defined in order to prevent mistakes occurring between live ammunition and less-lethal ammunition.[465] Moreover, the instructions for the use of paintball guns provided that insofar as there would be any need to use them, they should be fired first at the feet, and then aimed higher if necessary (but not at the groin).[466] They also stated that the paintball guns should not be used if as a result 'a child under the age of 14 or women who appeared to be pregnant might be hit.'[467]

c. Rules of Engagement - the rules of engagement can be found in the legal annex to the land and sea operation order. The 'rules of conduct for the forces' (for the purposes of this report, these rules will be referred to as 'the rules of engagement') state that, as a matter of principle, in 'the scenario under discussion', i.e., 'dealing with foreign citizens who, according to the existing information, are not combatants' - the authority and measure that involve the use of force shall not be used

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462 There are two types of shells used by the IDF which differ in the amount of gunpowder they contain: a soft bag and a hard bag, the latter of which was not used in the operation. See *IDF completion response of 15.11.2010*, *supra* note 400, at para. E.

463 *Id.*, at 33, para. 4(f).

464 *Naval Operational Order 3*, *supra* note 445, at 35, appendix D, para. 6(6), 6(8).

465 *Id.*, at appendix D, para. 6(10).

466 *Id.*, at appendix C, para. 4(h).

467 *General Staff Operational Order 3*, *supra* note 445, at 19, appendix C, para. 2(g)(b)(9); *Naval Operational Order 3*, *supra* note 445, at 62, appendix G, para. 2(g)(b)(9).

against citizens, beyond the minimum required to fulfill the mission, i.e. stopping the vessels. The general rules for the use of force provided that, in general, force would not be used, and that it would be used only as a last resort, for the purpose of 'preventing danger of injury to human beings or to deal with an attempt to thwart bringing the vessels to an Israeli port.'[468] It was clarified that the use of force must be minimal and proportionate, and weapons should be used on an increasing scale.[469] The operation order permits use of less-lethal weapons only when this use is required in order to 'neutralize a real danger to the safety or lives of human beings that comes from a specific person, and states that insofar as it is possible to neutralize the cause of the danger without using less-lethal weapons, this should be done.[470] It also states that it is permissible to use less-lethal weapons if there is a real anticipation that the event could deteriorate into a situation in which a real and immediate threat to life is foreseeable, and the use of less-lethal weapons is likely to prevent this deterioration; it further states that less-lethal weapons could only be used by those who have been trained to do so, and in accordance with the operating instructions and safety designations that had been formulated.

Regarding the use of lethal weapons, the operation order also states that, as a rule, live ammunition should not be used.[471] The use of lethal weapons was permitted in one situation only, namely in self-defense, for the purpose of averting a real and immediate danger to life, when it is not possible to avert the danger by less harmful means. It should be noted that the definition of 'danger to life' in the operation order is: 'a real and immediate danger of the loss of human life or serious physical injury.'[472] It should also be noted that the order states that lethal weapons should be used only as a last resort, after warnings have been given to the person against whom a lethal weapon is going to be used. It also states, with respect to the use of lethal weapons, that if there is a real concern that the gradual action "would endanger life, then it is permissible to shoot at the one creating the danger in order to eliminate the danger immediately, even without engaging in all of the stages set forth above."[473] The order

468 *General Staff Operational Order 3*, *supra* note 445, at 17, appendix C, para. 2(g)(1)(a); *Naval Operational Order 3*, *supra* note 445, at 60, appendix G, para. 2(g)(1)(a).

469 *General Staff Operational Order 3*, *supra* note 445, at 18, appendix C, para. 2(g)(1)(b); *Naval Operational Order 3*, *supra* note 445, at 60, appendix G, para. 2(g)(1)(b).

470 *General Staff Operational Order 3*, *supra* note 445, at 18, appendix C, para. 2(g)(2)(b)(3); *Naval Operational Order 3*, *supra* note 445, at 61, appendix G, para. 2(g)(2)(b)(3).

471 *General Staff Operational Order 3*, *supra* note 445, at 18, appendix C, para. 2(g)(2)(a)(2); *Naval Operational Order 3*, *supra* note 445, at 61, appendix G, para. 2(g)(2)(a)(2).

472 *General Staff Operational Order 3*, *supra* note 445, at 16, appendix C, para. 2(g)(2)(a)(2); *Naval Operational Order 3*, *supra* note 445, at 59, appendix G, para. 4(g)(2)(a)(2).

473 For an expanded version of the rules of engagement see para. 206 below.

also provides that after the danger has been averted, an attempt should be made to capture the party endangering life in another manner without the use of weapons, that harm to those not involved should be avoided, that there should be no use of force at a person who has surrendered or has ceased to constitute a threat, and that medical treatment should be given to the wounded immediately upon the cessation of use of force.

From the statements of the commanders and soldiers at all levels it can be seen that these rules were made clear to the forces that took part in the operation.[474] At an operational briefing on May 20, 2010, the Navy Commander said that there was no intention to injure or punish the persons on board, and he went on to say that the Israel Navy's goal was to carry out the mission 'as professionals and in accordance with IDF ethical code.'[475] Moreover, it was also stated at that briefing that 'opening fire should only take place in a life threatening situation, to neutralize the person presenting the danger, but nonetheless, 'where possible, the benefit of doubt should be given.'[476]

Thus, the first soldier who fast-roped down from the first helicopter (hereafter: **the first soldier** or **soldier no. 1**) stated in the additional investigations of the Eiland Committee that were carried out at the request of the Commission: 'In the briefings, including my personal talk with the commander of my team, it was emphasized that the use of live weapons was the last option and a response to an immediate danger to life.'[477] The second soldier who fast-roped down from the first helicopter (hereafter: **the second soldier** or **soldier no. 2**) also stated: 'The rules of

474 See the testimony of the commander of Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2, and see also the testimony of the commander of the Takeover Force, 1; and the testimony of Questioner 2, *Id*. It should be mentioned that from the material before the Commission it arises that the forces received extensive mental preparation which included gathering information and writing insights towards preparation, and the preparation of the commanders to perform the preparation (by the Navy's behavioral science branch); the conversation of the Shayetet commander with all the commanders in the operation; two Company Command talks with all the commanders; 2 lectures by a Masada unit combatant about ways to deal with riots (one lecture to the commanders and one to the soldiers); a talk by each center commander with the forces in the center; analysis and investigation of the model in light of mental conduct (in this context see *IDF completion response of 15.11.2010*, *supra* note 400, at para. F). On the importance of this preparation in relation to the Open Fire instructions, see also the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 38.

475 The summary of meeting headed by Navy Commander "Final Briefing for Operation 'Winds of Heaven 7' - Navy commander's Summary" (summary of meeting headed by Navy Commander, Jul. 4, 2010), at para. 2(a)(5), the folder containing the exhibit has been marked as folder 90 by the Commission.

476 *Id.*, at para. 2(c)(8)(b); See also *IDF completion response of 15.11.2010*, *supra* note 400, at para. F.

477 Testimony of soldier no. 1, *Id.*, at 1.

engagement were very strict, and the emphasis was that changing over to live ammunition would be a very exceptional event and only if we faced a real and immediate danger to life and it would not be possible to avoid harming him should we use live ammunition in order to neutralize the threat.'[478]

d. Communications blackout - the instructions that were given in the operation order were to allow distress broadcasts, insofar as these did not endanger the military operation. Emphasis was also placed on the duty of care in this regard, the need to limit the blackouts insofar as possible and to terminate the blackouts when the military need ended. It was also determined that in a case of distress, insofar as a broadcast was not possible, assistance would be provided to the flotilla vessels by Navy ships.[479] Thus it was also determined that any electronic blackout or disruption of communications that was not one of the types of blackouts approved in the operation order required specific, separate, and detailed legal consideration, and that any such additional blackouts would be carried out only with the approval of the Chief of Staff's office.

e. Procedure for treating the injured - the medical annex to the order addresses, in its objective clause, both the treatment of combat personnel and providing medical treatment for civilians on the various flotilla vessels.[480] The procedure itself gives details of the medical personnel and medical equipment for the operation, the methods of evacuating and treating the injured and other professional details. The procedure relates, *inter alia*, to the subject of examining persons who are detained, a process whose purpose is to ensure that there is no medical condition that requires treatment in the emergency room.[481] The procedure also states that detained persons should not be examined without their consent and that if a detainee refuses an examination, a physician should explain to him the importance thereof and his refusal should be documented. In the legal annex to the order, it is stated that the injured and sick should be given medical treatment and be allowed to be evacuated from the incident site, and insofar as combat is taking place in the area where the injured are located, the evacuation should be allowed as soon as possible.[482]

f. Treatment of civilians - the legal annex to the operation order outlines rules of conduct for the forces and it states, *inter alia*, that

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478 Testimony of soldier no. 2, *Id.*, at 1.

479 *General Staff Operational Order 3*, *supra* note 445, at 21-22, appendix C, para. 3(a)(4); *Naval Operational Order 3*, *supra* note 445, at 63-64, appendix G, para. 3(a)(4).

480 *Naval Operational Order 3*, *supra* note 445, at 29, appendix B, para. 1.

481 *Id.*, at appendix B, para. 6.

482 *General Staff Operational Order 3*, *supra* note 445, at 17, appendix G, para. 2(c).

civilians should be treated 'at all times in a dignified and polite manner, while protecting their dignity and property.' It also states that sensitivity should be displayed to the basic needs of the civilians: where necessary, they should be given water and food, no threats should be made to them and they should not be called upon to assist in carrying out military activity. It emphasizes the prohibition of making use of civilians as a 'human shield' or as 'hostages,' and that civilian property may not be damaged or used, and that taking it constitutes a serious criminal offence.[483]

g. Dealing with persons suspected of military / terrorist activity or assisting such activity - the legal annex instructs the forces that when the flotilla vessels enter the territorial waters of the State of Israel, the treatment of suspects, including the question of arresting them, should be referred to the Israel Police or the Israel Prison Service. The instructions also state that persons suspected of such activity may be arrested, but for this purpose reasonable force may be used only to the extent required to carry out the arrest. The procedure goes on to emphasize that arrestees should not be harmed after they are arrested and their dignity and security should be safeguarded. The procedure also states that the circumstances of the arrest and the identity of the arrested persons should be documented.[484]

The instructions for the land operation define the mission as follows: "Navy - the theatre of Ashdod, in cooperation with the other forces, will prepare for receipt of the 'Winds of Heaven' vessels (cargo and passengers) and their transfer for the rest of their handling by the authorized entities." The order defines four stages in the handling of the flotilla participants: the entry of the vessels into the port; debarking of the flotilla participants into a facility for absorption and classification; the flotilla participants leaving the port area (boarding buses and arriving at a detention facility); the stage from their detention until they leave the borders of the country. The order is detailed and it specifies the tasks and the division of responsibility between the various entities including, *inter alia*, the Navy, the intelligence division, the planning division, the telecommunications division, the land command branch, the IDF spokesperson, COGAT, the chief military prosecutor command, the Military Police, the Israeli police, the Ministry of the Interior, the Foreign Ministry, the Prison Service, the Ministry of Transportation, etc.). The order contains, *inter alia*, annexes regarding security, medical care, information security, as well as an annex

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483 *Naval Operational Order 3*, *supra* note 445, at 59, appendix G, para. 2(b); *General Staff Operational Order 3*, *supra* note 445, at 16-17, appendix C, para. 2(b).

484 *Naval Operational Order 3*, *supra* note 445, at 73, appendix G, para. 2(d); *General Staff Operational Order 3*, *supra* note 445, at 17, appendix C, para. 2(d).

concerning the seizure of equipment belonging to the flotilla participants and a legal annex identical to the legal annex attached to the naval order, which defines rules of conduct for the forces.

The military operation for enforcing the naval blockade on May 31, 2010 - the implementation stage

122. The military operation carried out in order to stop the aforesaid flotilla will be reviewed below according to the following stages: (1) The communications and warning stage; (2) giving the order to carry out the takeover; (3) the takeover stage and bringing the flotilla vessels to Ashdod port - first we shall review the takeover of the *Mavi Marmara*, and then we shall address, in brief, the takeover of the other vessels; (4) from arrival at Ashdod port until the deportation of the flotilla participants from Israel on June 2, 2010.

The inquiry and warning stage

123. The inquiry stage for the flotilla vessels began on May 30, 2010, at around 9:00 p.m.[485] The stage of transmitting communications began on May 30, 2010, at 10:40 p.m., when the flotilla vessels, which were moving close to one another, were in the area of the latitude of Sidon (Lebanon), at a distance of eighty nautical miles from the shore. This stage concluded on May 31, 2010, at 12:41 a.m., when the vessels were in the area of the latitude of Nakura (Lebanon), at a distance of eighty nautical miles from the shore.[486] The communications were sent by operators designated for this purpose (naval officers located on the command ship during the operation who transmitted communications to the vessels in the flotilla in accordance with the operation command). The communications were transmitted by means of a Sailor radio device (an international civilian radio device for communication between vessels at sea and between vessels and coastal stations. The Sailor device has fixed channels not subject to alteration, including the international distress channel [channel 16]).

The recordings from the radio network that were submitted to the Commission show that four communications were indeed transmitted in full and according to the prepared text. The optional fifth communication was not transmitted. As stated, the warnings emphasized the fact that

485 The *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 24.

486 "IDF Answer to Completion Request" (Nov. 7, 2010), at 5, the folder containing the exhibit was marked as folder 136 by the Commission [hereinafter *IDF Completion Response of 7.11.2010*].

the vessels were about to enter an area in which a naval blockade had been imposed and a clarification that there was nothing that prevented the humanitarian supplies on the vessels entering the Gaza Strip via the land crossings, and the vessels were invited to go to Ashdod port for this purpose. The third warning included a notice that all legal measures would be taken in order to prevent the vessels entering the area of the naval blockade, and the fourth warning included a notice that, if necessary, IDF soldiers would board the vessels.[487]

Two of the radio operators, whose function was to transmit the communications, stated in the supplementary investigations.[488]

> The first radio operator stated:
>
> 'We began with the standard inquiry to every vessel at sea. After that we went on to the request of the Israeli Government to enter Ashdod port and transfer the supplies to Gaza.
>
> Next we went on to the communication that says that the area is closed and according to international law it is prohibited to enter the area, and we said that the vessel was in danger. The captain himself and the flotilla organizers were warned that they were responsible for any harm to the vessel and the persons and cargo on board. At no stage was there a break in communications and the message was transmitted clearly.
>
> …
>
> The transmission of the messages began a long way from the coast of Gaza and there was enough time to respond… *Mavi Marmara* repeatedly transmitted a fixed message that the Navy did not have power to stop them and that they were sailing to Gaza… In my opinion, all of the communications were transmitted clearly and in clear and unambiguous language.'[489]

124. All of the flotilla vessels, apart from the *Sofia*, responded to the radio communications.[490] The recordings from the radio network show the character of the responses that were received from the flotilla vessels. The captain of the *Mavi Marmara* said that he refused to stop since the purpose of the flotilla was humanitarian only, and because Israel did not have authority to act against the ship outside its territorial waters. When the captain of the *Mavi Marmara* was warned that if the ship did not stop,

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487 Questioner 2's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1-2.

488 For the exact wording of the warnings, see para. 121 of this report. Questioner 2 testified that the messages were transmitted "word for word as they appear in the order, see Questioner 2's testimony, *Id.*, at 2.

489 *Id.*, testimony of interrogator 1.

490 See the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 25; See also *IDF Completion Response of 7.11.2010*, *supra* note 486, at 6.

it would be responsible for the consequences, a response was heard on the radio network that if the Israeli Navy attacked the ship, it would be the Israeli Navy that would suffer the consequences. Subsequently two other responses were heard on the radio: 'Shut up, Israeli Navy, shut up!'[491] and "Shut up, go back to Auschwitz," followed by: "We're helping Arabs to go and get the US, don't forget 9/11, guys." Due to the fact that the radio was operated on channel 16, the international frequency, it is not possible to determine which of the vessels made these statements.

The second radio operator also stated in this regard:

> 'The responses [that were received from the flotilla vessels] were that we were prohibited from doing what we were doing. They always finished by emphasizing the fact that they were on the way to Gaza. As time passed, the responses became more extreme, as our communications became more resolute. They said all the time that they would reach Gaza but they did not say at any stage that there would be resistance to the takeover although they were told we were about to take them over. In one of the responses they said in English: "Go back to Auschwitz".'[492]

The first radio operator said in his statement: 'From the responses of the vessels it was possible to understand that there was a determination to hold a confrontation and to try to reach Gaza at any cost.'[493]

125. It should be noted that apart from the responses that were received by radio communications, there was no noticeable attempt to change course. The aerial lookout watching the video monitor during the incident (hereafter: **the aerial lookout**) stated: 'I began my shift at approximately 3:00 a.m. … During the whole voyage and my monitoring of the ships I did not identify any change in the course of the *Mavi Marmara* or any of the other vessels.'[494]

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491 See video file "Shut Up.wav", in folder 663 on *Navy Data Disc*, *supra* note 5. See also the recordings in the "Achi Hanit" folder within the "Winds of Heaven 7" folder, *Id.*; in his investigation by an IDF investigative unit following the event, the captain of the *Mavi Marmara* testified that during the questioning he answered the Israeli Navy's questions, changed course to about 180 degrees and sailed south about 75 miles from the Israeli shore. According to his claim this was the last time where contact was established with him until the time of the raid and at this time he did not receive any additional warning; see article: 03/06/10/825/5092 *Military Intelligence Reports* (Jun. 3, 2010), the folder containing the exhibit was marked by the Commission as folder 89 [hereinafter *Military Intelligence Reports*].

492 *Id.*; for the recording of the words spoken over the radio see CD *From Peace Flotilla to Terror Flotilla* submitted by the army (minute 3:00), found in a folder marked by the Commission as exhibit 89 of the Commission's exhibits.

493 Questioner 1's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; see also the flotilla diagrams found in folder 89.

494 *Id.*, testimony of the aerial look-out, as well as testimony of questioner 1, at 2.

After the aforesaid four warnings were sent, no additional warning was given before the vessels were taken over. The first radio operator stated that he made sure that the communications were transmitted to all of the vessels, and that the reason why no additional warning was given was operational needs for a covert takeover of the vessels.[495]

Giving the instruction to take over the ships

126. At the end of the warnings stage and when the flotilla vessels were at a distance of approximately 70 miles west of the coast of Atlit, the order was given to take over the flotilla vessels.[496] The order given by the Navy Commander was sent to the naval command post at Navy Headquarters, where the head of the Operations Division, Maj. Gen. Tal Russo, was also stationed, and also to the supreme command post. From there, the order was transmitted to the maritime forces' control center, which informed the takeover forces command, which, in turn, transmitted it to the commanders of the takeover force.[497]

Before the takeover operation began, and pursuant to the operation instructions and the order of Navy Command, at 4:06 a.m. communication blackouts were employed vis-à-vis the *Mavi Marmara*. According to the IDF, the screening activity did not affect the ability of the vessels to move safely. Despite the use of the screening, several short video clips and several messages were sent from the *Mavi Marmara* during the takeover operation.[498]

The takeover operation itself began at 4:26 a.m. with the takeover of the *Mavi Marmara*.[499] We shall now address this in detail. Thereafter, we

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495 *Id.*, testimony of questioner 1, at 2.

496 See the Chief of Staff's Presentation, which was shown as part of the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 25. See also the Chief of Staff's presentation on the Commission's website.

497 This order of actions is described in *IDF Completion Response of 7.11.2010*, *supra* note 486, at 6. It should be mentioned that according to the Eiland Commission's Report (though this is not mentioned in the IDF completion response submitted to the Commission) it arises that in accordance with the Chief of Staff's instructions to approve the takeover operation in real time, at 04:00 AM (half an hour prior to the start of the takeover operation) the Chief of Staff held a "telephone situation analysis" with the head of the Operations Directorate and approved the takeover in light of the status report submitted to him. According to what has been stated in the Eiland Commission Report the Defense Minister also called the command post about 15 minutes prior to the takeover, and was given a status update and the Chief of Staff's approval for the takeover by the head of the Operations Directorate (see *The Eiland Report*, *supra* note 402, at 54).

498 See *IDF Completion Response of 7.11.2010*, *supra* note 486, at 6.

499 The Chief of Staff testified that the action started at 04:28; See the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 25; however from other materials before the Commission it seems that the operation started at 04:26; see *Eiland Report*, *supra* note 402,

shall briefly discuss the takeover operations of the other flotilla vessels, in which there were no loss of lives.

The takeover of the Mavi Marmara

127. As we have said, the *Mavi Marmara* was the largest passenger ship among the flotilla vessels. At the outset we should state, which will be further elaborated below (see paras. 164-167, 190-201 below), that in retrospect it transpired that, *de facto,* the persons on board the *Mavi Marmara* fell into two main groups: the *first group* of peace activists, which was the largest group, whose members boarded the *Mavi Marmara* at the port of Antalya; the *second group*, which included both approximately 40 activists in the Turkish organization called IHH, who boarded the *Mavi Marmara* at the port of Istanbul and who marked themselves as a separate group by means of items of equipment and carried out preparations before the takeover operation began; as well as flotilla participants who were either individual activists or belonged to other organizations and who decided to take part in the violent incidents for various reasons. This second group, which for ease of reference will be referred to below as '**IHH activists,** was the one which partook in the violence on board he *Mavi Marmara*.

The statements and the materials, including the magnetic media, indicate that the takeover of the *Mavi Marmara* began with an attempt to board from Israeli Navy Morena speedboats. This attempt failed because of violent resistance on behalf of some of the flotilla participants, which included throwing objects at the soldiers, shooting water at them with hoses, cutting the ladders on which they were climbing with an electric saw, using lights to blind them, etc. At this stage, it was decided to take over the ship by means of fifteen soldiers who would fast-rope down onto the roof from a helicopter. The soldiers encountered extreme violence - three of them were taken to the hold of the ship after they had been wounded, two were shot, and others suffered serious physical injuries. In response, the soldiers resorted to shooting with less-lethal and lethal weapons. Ten minutes later, an additional force fast-roped down onto the roof of the *Mavi Marmara* from a second helicopter, which also encountered extreme violence, and assisted in the attempts to secure the upper decks. Ten minutes later, a third force fast-roped down from another helicopter, and assisted in securing the position and move to the command bridge. At the same time as the third force of combat personnel fast-roped down on

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at 96; the Commander of Center A's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1.

to the *Mavi Marmara*, other forces climbed up from Morena speedboats, after the commander of the force on the Morena speedboats realized that apparently a soldier from the force on roof was missing (in fact, three soldiers were missing). The stage of taking over the *Mavi Marmara* ended after the combat personnel from the third helicopter took control of the command bridge and the Captain of the *Mavi Marmara* announced on the *Mavi Marmara's* loudspeaker system that the ship was under IDF control.

Below we shall review the stages of the operation and the takeover of the *Mavi Marmara* in particular, as it arises from the statements of the combat personnel who took part in the takeover. It should be noted, the purpose of this section of the report is to provide a broad description of the takeover of the *Mavi Marmara* and the violence that the IDF faced.

The first attempt to board the *Mavi Marmara* from the Morena speedboats

128. According to the takeover plan, in the first stage of the operation an attempt was made by the Shayetet 13 servicemen to board the *Mavi Marmara* from the sea, by means of two Morena speedboats (hereafter: **the first Morena speedboat** and **the second Morena speedboat**). The first Morena speedboat was commanded by the commander of "center A", the most senior commander in the entire force that was designated to take control of the *Mavi Marmara* (hereafter: **the Commander of Center A**).

The first Morena speedboat reached the *Mavi Marmara*, came alongside it and an attempt was made to raise the poles with climbing pegs on them in order to enable the combat personnel to climb onto the deck. The Morena encountered resistance that included the shooting of water from hoses towards it, blinding lights being directed at it and the throwing of various objects, such as pieces of metal, bottles and the shooting of glass marbles from slingshots. The Commander of Center A decided to allow the firing of paintball guns and the use of flash bang grenades, but after approximately a minute during which the resistance did not diminish, he decided to retreat with the Morena and allow the helicopter force to open up a path for boarding from the sea.[500]

129. The second Morena speedboat encountered resistance from IHH activists who threw various objects on the combat personnel, including iron bars, screws,

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500 The Commander of Center A's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1; Team Commander R's testimony, *Id*., at 1.; See also the testimony of soldier no. 19, who was also on the command vessel: "at this point there was lighting from 2 large floodlights (Xenons) from the direction of the ship towards the NSW boats, and the whole event was accompanied by a lot of noise and chaos. Likewise, I saw the activists on the boat using water hoses to spray the NSW boats", *Id*.

etc. The commander of the second Morena speedboat (hereafter: **Commander of the Takeover Force**) gave an instruction to fire less-lethal weapons (beanbags, paintball rounds and flash bang grenades) at these participants, and as a result some of the IHH activists left the side. At this stage, the combat personnel threw a ladder in order to make it possible to climb up. When they began to climb up, the Commander of the Takeover Force discovered that the metal part that held the ladder to the side of the ship had been cut. In view of the fact that IHH activists returned to the place where they were climbing up and began to throw objects at the force from there, the Commander of the Takeover Force decided to withdraw with the Morena speedboats.

> The Commander of the Takeover Force stated:
>
> 'We obtained eye contact with the *Mavi Marmara*. I saw a very large number of activists who were waiting for us on the sides around the whole boar and on all the levels, including at the stern, on all the decks at the bow and on the sides…
>
> As I said, the people on the sides, most of them were masked, some with gas masks, all of them with orange protective vests. The men held iron bars, slingshots, chains.
>
> As we approached, I gave an order not to carry out any shooting at this stage, including with less-lethal weapons. When we came close to the stern, we began to receive a barrage of objects, anything that came to hand, including metal bars, metal chairs, large cans of tinned food, large screws, which hit the combat personnel and the boat. One of the combat personnel was hit by a blunt object in the face and was cut under the eye. Another of the combat personnel was hit by a metal object on the head, and I gave an order to fire less-lethal weapons at the persons using violence against us.
>
> The persons on the lower deck of the stern ran back, while on the higher decks they continued to throw things on us…
>
> As a result of the firing of the less-lethal weapons, the side was vacated and my combat personnel raised the ladders and attached them to the side. I should point out that during the whole stage of raising the ladders; we continued to receive a salvo of objects from the higher decks, which hit the combat personnel. The combat personnel requested permission to fire live ammunition, but I did not give them approval. It should be said that as a result of firing the less-lethal weapons, as I said, the persons on the deck had moved back and from my point of view as a commander, the less-lethal weapons had achieved their purpose and there was no need to fire live ammunition. I began to climb first up the ladder and at that stage the top part of the ladder collapsed, hit me in the face (the ladder is made up of a flexible rope ladder

> with flexible metal rungs, at the end of which is a metal rung that attaches to the side of the ship). I looked at the rung and saw that it was cut with an electric saw. At the same time, we prepared another ladder for climbing up while we still alongside the ship, when at the same time the persons on board, the activists, who retreated as a result of the firing of less-lethal weapons, came back to the climbing point. At this stage they were on top of us. The distance that they were above us was approximately two meters and they *de facto* had a commanding position above me. In other words, they had the advantage of height over me. The activists returned to throw objects at us. At that stage, I heard them shouting "Allahu Akbar." I understood that whoever was making such shouts in such a "mad" and "extreme" way was exuberant, extreme and dangerous. We continued to receive a barrage of objects and because we were very close to the activists, I and the combat personnel were in danger. I hesitated as to whether to open fire and decided to withdraw with the boat. I made a report on the radio that there was major violence on the ship. I received an update that the same thing also happened on the other side to the second team that tried to climb up from the sea.'[501]

At this stage, the commander of the second Morena speedboat made another attempt to board the ship from the sea, from the middle of the ship. This attempt also encountered major opposition from the IHH activists and the Commander of the Takeover Force decided to withdraw with the Morena speedboat and to wait until the helicopter soldiers open the side up for climbing:[502]

130. The aerial lookout stated about these events:

> 'During the preparations, I saw the activists on the ship preparing all kinds of objects. I saw persons with cameras and large numbers of persons gathering all along the decks.
>
> When the Morena speedboats approached the ship, I saw a massive throwing of objects by the activists at our boats. I also saw several explosions that might have been shooting at the Morenas.
>
> The Morenas moved away because they did not succeed in climbing up.'[503]

It should also be noted in the recording of the aerial lookout's radio network, at 4:29 a.m. it is possible to hear reports from the Morenas of

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501 The Commander of the Takeover Force's testimony, *Id.*, at 2-3.
502 Commander of Center A's testimony, *Id.*, at 2-3.
503 Testimony of the aerial look-out, *Id.*

a heavy barrage of stones and bottles, and as a result, that the combat personnel were prevented from boarding the *Mavi Marmara*.[504]

The video recordings that were submitted to the Commission by the IDF document some of the resistance of the IHH activists at the stern of the *Mavi Marmara*;[505] thus, for example, the security camera that was placed on the lower level of the *Mavi Marmara* show at 4:26 eight men wearing orange life jackets, some of them wearing gas masks and one of them holding a wooden club, looking in the direction from which the first Morena arrived.[506] In a video film recorded by one of the flotilla participants on a digital camera that was in his possession (the camera's clock indicates that the recording began at 4:27 a.m.),[507] the first Morena can be seen coming alongside the stern of the *Mavi Marmara* while several IHH activists along the stern are shooting water at the Morena from hoses and are directing a searchlight at it. It should also be pointed out that during the film, which lasts 2:05 minutes, cries of 'Allahu akbar' from the IHH activists at the stern can be heard.[508] In two additional video clips, IHH activists can be seen carrying long poles, some of them wearing masks on their faces, one of them directing a searchlight at the Morenas and one of them is seen throwing something at the Morenas.[509]

It should also be pointed out that various video films show that after the attempts to climb up from the Morenas to the stern of the *Mavi Marmara* were stopped and the Morenas moved away, a group of IHH activists remained at the site, armed with long poles, some wearing gas masks and one holding a slingshot.[510]

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504 See file "Neshek Ham.mov" in folder *Air*, *Navy Data Disc*, *supra* note 5; this is a taping from a visual device along with calls over the radio as received in the Zofit. The video permanently displays a clock indicating the precise time of taping.

505 See *Navy Data Disc*, *supra* note 5.

506 See video files from the security camera in folder *Security Cam* in folder *Arab* in folder Ruhot HaShamaim7, on data hard disc received from the army, marked by the Commission as exhibit 133 [hereinafter *Arab Data Disc*].

507 NB: According to the properties of the digital camera file later seized by the IDF forces.

508 See: video file "00983.MTS" in folder *STREAM* in folder *BMDV*, in folder *AVCHD* in folder *Sony* in folder *Video*, *Arab Data Disc*, *supra* note 506.

509 See video file "SatilCam_GoingOnBoard14" in folder *Sea*, *Navy Data Disc*, *supra* note 5 (carrying metal bars and aiming floodlights at NSW boats); See also video file "SatilCam_GoingOnBoard13" *Id*. (carrying metal bars, throwing objects at NSW boats).

510 This matter is verified by two sources: the security camera positioned on the bottom deck shows that this group of activists remained in place between 04:30 and 05:04 (see: security camera video files in folder *Security Cam*, *Arab Data Disc*, *supra* note 506). The security camera files one of the activists is even seen hurling a marble with a slingshot at 04:44 (according to the security camera's clock) towards the water near the stern, and one of the activists was also seen throwing some object towards the water near the stern at 05:04 (according to the security camera's clock). This was also documented in the videotaped by one of the participants of the flotilla with a digital camera he was carrying. According

Fast-roping down from the helicopters

131. *The first helicopter*. At 4:29 a.m. the soldiers began to fast-rope down from the first helicopter. In view of the violence that the navy force encountered[511] and the fact that on the roof of the ship there were approximately 10-15 IHH actists, the Shayetet 13 commander ordered the force commander in the first helicopter from which the soldiers fast-roped down (hereafter: **the third soldier** and **the first helicopter,** respectively) to prepare two flash bang grenades and to throw them before they fast-roped down from the helicopter.[512] The first helicopter arrived above the *Mavi Marmara* with fifteen Shayetet 13 combat personnel. Some of the soldiers on the helicopter identified dozens of people on the roof of the *Mavi Marmara*, some of whom were wearing what appeared to be orange life jackets and with gas masks on their faces.[513] The rope was lowered

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to the camera's clock the events were videotaped at 04:47, that is, at the height of the takeover action executed through descent by fast rope from the helicopters, as will be detailed later on.

511 From the testimonies by the soldiers it arises that they did not hear any report over the radio regarding what was happening on the NSW boats at the time, see for example soldier no. 1's testimony, at 1, ("we reached the ship with the helicopter, prior to my descent I didn't hear any report over the radio about what was happening on the ship"); at the same time it seems that the commanders received a report regarding the events, see the Shayetet 13 Commander's testimony, at 3 ("I am aware of the great number of people on the sides of the ship and the resistance"), as well as soldier no. 3's testimony, at 1 ("I hear over the radio that the naval force is meeting with violence and harsh aggression and that the decision is that the naval force will not climb up. I remember hearing over the radio that their ladders were sawn and objects, chains, chairs and forks were thrown at them"), *Inquiry Expansion of 20.9.2010*, *supra* note 451.

512 See solider no. 3's testimony, at 1 ("the Shayetet Commander orders me to prepare two stun grenades"); see also the testimony of Shayetet 13 commander, at 4 ("at this stage I'm speaking with the commander of the first helicopter [soldier no. 3] and stress that before descending he should throw down a number of stun grenades in order to drive people away and allow the soldiers to descend and organize as a unified force"), *Id*. Soldier no. 5, who served as a team commander on the first helicopter testified: "I identify people down there and in the preliminary planning between the commander of the force and myself it was decided that in such a case of people concentrated at the place we were planning to descend to - we will throw stun grenades from the helicopter (pyrotechnic weapons) in order to drive the people away and allow the safe descent of the force." See soldier no. 5's testimony, 1, *Id*.

513 See testimony of soldier no. 1, at 1 (from the helicopter I identified about 15 people, some with smoke/gas masks on their faces/heads and most with life vests (in retrospect we found out that these were protective vests for all intents and purposes), testimony of soldier no. 3, at 2, ("I identify dozens of people there. 30-40 [thus in source] people on the roof, with life vests, gas masks, holding chairs"), *Id*.; By comparison soldier no. 4 testified in response to the question "what did you notice from above before descending?" that "there was light but I did not notice anything and the light was from the helicopter", testimony of soldier no. 4, at 1, and soldier no. 12 testified: "a little before arriving we open the door, the team commander and I are sitting with our legs outside the door and the soldier behind me is holding me according to procedure. We reach the area above

and two stun grenades were thrown.[514] Immediately after that, before the soldiers began to fast-rope down, the rope itself was tied to the radar antenna on the roof of the ship by IHH activists.[515] In view of this, another rope was thrown down from the other side of the helicopter, another flash bang grenade was thrown and the soldiers began to fast-rope down the second rope, not in the order of descent that was planned in advance.[516]

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the ship, I see a lot of people on the roof (15-20 people) in a group. I see they are wearing orange belts", testimony of soldier no. 12, at 1, *Id*.

514 It is unclear whether one grenade was tossed or two. A number of soldiers believed that two stun grenades were thrown, while others believed that one was thrown. See *IDF completion response of 15.11.2010*, *supra* note 400, at para. K.

515 See testimony of soldier no. 3, at 2 ("after the rope was tossed out the right side two stun grenades (flash bang), as stated were thrown, in a short period of time the rope was taken and tied to the antenna on the roof, which endangers the helicopter and the the [thus in original] people descending. I'm in a spot where I am looking at the roof of the ship from the opening in the helicopter, the helicopter is hovering at a height of 25 meters over the ship. After the rope is tied to the antenna I understand that it is impossible to descend and give the order to throw the second rope from the other side. After the rope is thrown the soldiers begin gliding down on it"); See also the commander of the takeover force's testimony, at 3 ("at this stage I see that the helicopter's rope was tied and I told myself the helicopter is going to crash if the rope stays tied"). This was also testified by soldier no. 4 (who in reality was the third soldier to glide down from the first helicopter and was soldier 3's radio operator): "Soldier no. 5 sat at the helicopter's opening, noticed a number of people on the roof and threw a number of stun grenades in order to make them scatter, then threw the fast rope down and I noticed they were grabbing the rope and tying it"; testimony of soldier no. 4, at 1; See also testimony of soldier no. 5, at 1 ("at this stage the airborne mechanic throws the rope we're preparing to glide down to the roof, immediately after I throw a stun grenade at the people coming to grab the rope. On the roof there is a group of about 5 people trying to grab the rope. The people on the roof grab the rope from the helicopter and pull it towards the radar antenna on the roof. Immediately afterwards I throw a stun grenade at the group of activists fiddling with the rope. The first grenade thrown causes shock for a second or two and the second grenade does not influence their behavior (it should be mentioned that grenades of this type only create noise and a flash of light). Afterwards I tell the soldier sitting next to me to throw the stun grenade he has"). See also testimony of soldier no. 12, at 1 ("the airborne mechanic threw down the fast rope, after he threw it down the people down there tied it to the radar antenna, we saw them fiddling with the rope and the team commander threw a flash bang grenade, the people down there were a little alarmed but since the grenades only make noise they understood that and went about their business"), *Inquiry Expansion of 20.9.2010*, *supra* note 451.

516 See testimony of soldier no. 1, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1 ("Soldier no. 5 ordered me to throw the stun grenade, I threw it at the roof, the grenade detonated […] the pilot gave an order to lower the first rope on the side opposite to me on the helicopter, the rope was lowered, I did not see this but in retrospect the rope was seized by the activists and tied to the body of the ship. The next stage was that they threw the second rope on my side, someone patted me on the back and signaled me to descend. I began gliding down to the ship[...]"); Testimony of soldier no. 5, at 1-2 ("by this stage the rope is tied to the radar antenna and is at a diagonal angle that does not allow gliding down it. At this stage we get an order on the radio to rappel. I update the force commander [soldier no. 3] that no option exists to descend on my side since the rope is at an angle that does not permit gliding down and the force commander decides to descend from the second side and updates me. At this stage we begin descending, due to the transition

It should be noted that the events mentioned above after the arrival of the first helicopter were recorded by video camera directed at the *Mavi Marmara* from the IDF's aerial observation post.[517]

132. The soldiers' statements and the video files transferred to the Commission that were filmed by various parties (including participants on the flotilla, video recording devices, etc.) indicate that the fifteen soldiers who fast-roped one after the other from the first helicopter encountered severe violence upon landing on the roof of the *Mavi Marmara*. This violence included the use of physical force and attacks on the soldiers using various means, such as wooden clubs, iron rods, slingshots, knives, etc., as well as the use of firearms. Three soldiers were taken below deck. The soldiers' statements indicate that they were astounded by the fierceness of the resistance. They had expected, at most, verbal resistance, pushing or punching, but not the scene of conflict that they encountered on the roof of the *Mavi Marmara*.[518]

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to the second side of the chopper (the rope on the planned side was tied), the order of descent is disrupted and we descend contrary to the original planning."); Testimony of soldier no. 4, at 1 ("Upon throwing [thus in original] we were told to open the second door and prepare to descend from the second door. This created a situation where the order of descent was slightly altered from planning and soldiers 1 and 2 were the first to descend and soldier no. 3 and I descended after them."); As well as testimony of soldier no. 12, at 1, ("soldier no. 1 goes down first and the whole order of descent is disorganized. First we descended in opposite order but later the order of descent was according to the arrival of the soldiers to the rope"), *Id*.

517 See file "Neshek Ham" in folder *Air*, *Navy Data Disc*, *supra* note 5.

518 See for example testimony of soldier no. 2 ("During the preparation the message was passed that we were expected to encounter activists who would try to hurt us emotionally by creating provocations on the level of curses, spitting, removing face covering etc. but we did not expect a difficult physical confrontation"), *Inquiry Expansion of 20.9.2010*, *supra* note 451; Testimony of soldier no. 5, at 4-5 ("From the outset we planned for a condition of resistance but we expected resistance that in the main would attempt to prevent us from boarding the ship. We expected screams, curses, shoving, even a violent clash but only blows […] When I observe the incident from the helicopter as well as during the course of the descent I still feel that I am descending to moderate physical resistance rather than to a combat situation. In practice I find myself in a genuine battle […] my life is in danger and I must defend myself and the rest of the soldiers in the team that I command"); Testimony of soldier no. 6, at 1-2 ("In the preparations and briefings they always briefed us that we were expected to encounter peace activists and therefore the prospects that we would have to use weapons or other means was very low and from my standpoint there was nearly zero probability [...] Even after I received blows and people jumped me to hurt me the call that they were yelling "hot weaponry and a team member has fallen" led me to feel that matters had gone awry"); Testimony of soldier no.12, at 5 ("there was a huge gap between what I prepared for which was boarding a ship while meeting resistance from 'peace activists', and a situation where I am fighting to defend my life"); testimony of soldier no.15, at 1 ("I understood that I was in a combat situation against people who were trying to kill me and not against peace activists as we had been briefed during combat preparation"), *Id*.

At the outset, it should be noted that in response to this resistance, the soldiers used force of various types: hand-to-hand combat, shooting with less-lethal weapons; including the use of flash bang grenades, Tasers, the shooting of paintballs and beanbags, as well as the shooting of live ammunition. The conclusions of the analysis of the legality of the use of force by the IDF soldiers, under the circumstances, will be presented below in paras. 232-239. At this stage, the topic of discussion is only a general description of the circumstances that prevailed at the time of the soldiers' fast-roping onto the roof of the *Mavi Marmara* as evidenced primarily by the statements of the soldiers who participated in the take-over of the *Mavi Marmara* and the magnetic media collected by the IDF and furnished to the Commission.

The soldiers stated that as soon as the fast-roping commenced, the number of IHH activists on the roof at least doubled. Soldier no. 1 (the first soldier to fast-rope from the helicopter) stated about this matter as follows:

> "While I was still in the air, I saw that dozens of people were quickly joining the 15 people who were already there, and they were wearing gas masks, life jacket, and they were armed with iron clubs, rods, wrenches, axes."[519]

Soldier no. 3 stated: "As I was descending the rope, I saw that the number of people on the roof multiplied by four."[520]

The statements of the soldiers who fast-roped from the first helicopter indicate that they encountered a real resistance force, armed with clubs, iron rods, chairs, etc. In a 23-second video recorded by one of the flotilla participants who was on the roof of the *Mavi Marmara* when the soldiers descended from the first helicopter, one can see a number of soldiers rappelling on the rope from the helicopter, while the IHH activists, all of whom are wearing life jackets, beat them with clubs, hit them with fists, and kick them.[521] In the video, several soldiers are also seen lying on the deck, surrounded by IHH activists.[522]

The video of the *Mavi Marmara's* deck from the IDF's video devices on the aerial observation post also documents some of the violence employed against the IDF soldiers who descended from the helicopters.

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519 Testimony of soldier no. 1, *Id.*, at 1.

520 Testimony of soldier no. 3, *Id.*, at 2.

521 See video file "M2U0004" in folder *sony_handycam(silver)#2* in *Video* folder, *Arab Data Disc*, *supra* note 506.

522 It should be mentioned that at the end of the video, an IDF soldier is seen firing a pistol at one of the IHH activists who is about a meter away from him and the latter falls to the floor.

According to what is seen on film, at approximately 4:32 a.m., the first soldier rappelled down the rope. As he reached the roof, four men attacked him, hit him, and dragged him. Other soldiers can also be seen as they are fast-roping down and are immediately attacked upon landing, with rods, objects thrown at them, pushing, and punching. The aerial lookout who operated the video device stated: "As they reached the roof, I saw severe violence directed at the soldiers, including beating them with crow-bars, railings, chairs, etc."[523]

133. Three soldiers, soldier no. 1, no. 3 and no. 4, were attacked, beaten, and thrown onto the lower deck, from where they were taken below deck.

> Soldier no. 1 stated:
>
> "When I reached a height of 2 - 2.5 meters from the ship, people grabbed the end of the rope and pushed me to the side. Before I managed to touch my feet to the deck, about ten people jumped onto me and began brutally beating me from every direction, using clubs, metal rods and fists, and whatever they could grab. The blows were over my whole body and were concentrated mainly in the area of my face and head. It is important to note that at this stage I was not armed - my weapon was fastened behind my back and in my vest pocket I had a taser (electric shocker) which was completely irrelevant in light of the brutal attack on me. At this stage I sensed a real and immediate threat to my life, and I tried to reach the weapon (a mini-Uzi) on my back. I only managed to open the clips that were securing the weapon but I didn't manage to reach the weapon. At this stage I was occupied with attempts to reach my weapon while trying to protect myself as best I could from a fatal attack from the mob, and I waited for the rest of the soldiers to arrive.
>
> The attackers pushed me toward the side of the ship. Because of the large number of attackers, I did not manage to resist. A number of attackers grabbed me by my legs and my torso and threw me over the side to the deck below, about 3.5 meters.
>
> Up until this stage, I did not see any other soldier aboard the ship, and, to my knowledge, I was the only solder who had fast-roped onto the ship. Upon landing on the middle deck, I fractured my arm, and a mob of dozens of people attacked me and basically lynched me - including pulling off my helmet, strangling me, sticking fingers into my eyes to gouge them out of their sockets, pulling my limbs in every direction, striking me in an extremely harsh manner with clubs and metal rods, mostly on my head. I truly felt that I was about to die, way beyond what

523 Testimony of the aerial look-out, *Inquiry Expansion of 20.9.2010*, *supra* note 451.

> we define as life-threatening. The behavior of the people at this stage was definitely like fighters of an enemy which has come to kill the other side, that is, me. I felt that at any moment I would take a blow to the head which would kill me. At this stage the mob succeeded in tearing my vest off of me (which included the weapon) and the weapon fell out of the vest.
>
> I realized that I would not be able to overcome all of the attackers and in order to save my life I tried to jump into the water but: (a) I was worried that I would not fall into the water but rather onto the deck below me; (b) the mob blocked my access to the side. At a certain stage I managed to reach the weapon, I cocked it, and I shot one of the attackers in his leg.
>
> The considerations in shooting were as follows:
>
> 1) To distance the attacking mob from me and to minimize the injury to me.
> 2) To signal my location to the rest of the team on the ship and the fact that I was in distress and my life was in danger.
>
> Immediately after I fired the shot, I took an extremely harsh blow directly to my head from a metal rod. This stunned me briefly, and in this second they grabbed the weapon from me. At this stage, I thought that the mob wanted to take me as a captive and use me as a bargaining chip for entry to Gaza or in general. A lot of blood began streaming down my face from the wounds to my head. The mob continued to hit me and push me forward inside the ship."[524]

Soldier no. 3 (the commander of the force on helicopter 1 and the third who fast-roped from this helicopter) stated about the events that preceded his being taken below the ship's deck:

> "While descending down the rope I see that they are trying to throw different objects at us. I was struck with metal poles and rocks. As I reached the roof, I feel a very strong blow to the neck from behind, and I see around me about 15-20 people who are surrounding me - some of them have clubs, some have knives, axes.
>
> They are all wearing orange life vests, some of them have *kafiyot* over their faces, some have gas masks, and some have their faces uncovered. I realize immediately that my life is in danger, I realize that the lives of the other soldiers who fast-roped and are fast-roping are in danger. I understand as the commander that I am not in control of the situation. I manage to withdraw my

524 Testimony of soldier no. 1, *Id.*, at 1-2.

mini-Uzi which is secured on my back (the weapon is fastened to the protective vest, in a way that enables it to be "drawn" rapidly).

While I'm drawing the weapon, I feel myself flying - as the result of being pushed.

Someone pushes me forcefully and I fall onto the side. I find myself sitting on the deck with my back to the side and facing all the people surrounding me. The people surrounding me have axes, knives, metal poles and clubs, and they're running towards me - it's a matter of a second or two before they reach me. I manage to cock the weapon and release two bullets.

I don't know if I have hit anyone or who. People immediately reach me, grab the weapon from me, and hit me with full force with poles and clubs. I sit against the side with my knees bent - my side is turned toward the side of the wall, hands protecting my face. A mob of people around me are hitting me with many blows, mainly towards my head. The people surrounding me are going berserk, and they're constantly shouting "Allahu Akbar". I feel the blows on all parts of my body and, as I said, many blows to my head. After about two minutes while the people are beating me and I'm trying to protect myself, I feel a number of people grabbing my hands and feet, lifting me up. In this second I realize that they intend to throw me over the side into the water. I resist, thrust wildly, struggle, but without success. It is important to state that also during this time I continue to take very strong blows to the abdomen. I am fighting with all my strength until a certain stage when they manage to get me over the side of the boat. I am holding onto the side, with my hands, and hanging from the side. At this stage, the people from above me are hitting my hands and a second group of people is pulling me from below by grabbing my legs.

Very quickly, I fall to the level below the roof. As I land, another group of people are running towards me. Here as well there are shouts of Allahu Akbar. I am lying on the deck, there are many people above me, one of the people jumps on me and I feel a sharp pain in the lower abdomen. I put my hand there and I feel a knife, and I realize that I've been stabbed, I instinctively pull the knife out of my abdomen. It is important to state that, during this stage as well, I'm taking many blows, including from clubs."[525]

Soldier no. 4, the signal operator for soldier no. 3 and the fourth who fast-roped from the first helicopter, stated:

"As I reached the deck, I noticed a terrorist with an iron crow-bar waiting to strike me in the head, but when he tried to hit me,

525 Testimony of soldier no. 3, *Id.*, at 2-3.

> I pushed him, and immediately another four terrorists jumped onto me while one of them wrapped the chain around my neck and strangled me, while I am struggling with them I thought of drawing my pistol but I felt that if I drew it, because they were up against me and kicking me, I wouldn't be able to shoot and they would grab the pistol from me. At this stage, I lost consciousness (apparently from the strangling - I saw stars), and when I awoke, I felt that I was in the air, and three / four terrorists are throwing me from the roof to the bridge deck. I was very heavy, and I felt a very quick and forceful fall. About 20 men were waiting there with poles, axes and more, and as I fell (this seemed to me as if it were planned), they grabbed me and dragged me inside the ship."[526]

It should be noted that soldier no. 4 was critically wounded during this event. He suffered from a fractured skull, a hematoma in his right eye, and convulsions. After the event, he was anesthetized, placed on respirators, and operated on for a fractured skull.[527]

134. Two soldiers from the takeover force in the first helicopter were wounded by live fire, which, according to their statements, was shot at them by IHH activists: soldier no. 2 (the second soldier who fast-roped from the first helicopter) was shot in his abdomen by a bullet with 9 mm circumference; soldier no. 5 was shot in his right knee.

Solder no. 2 stated:

> "Upon exiting, I didn't see what was happening below and I fast-roped, during which I feel pulling on the rope and that they're trying to knock me off. Even before I landed on the deck, I get punched with a club to the head and I realize I'm entering an extremely violent situation and not as I had planned. About five terrorists jump onto me and I'm fighting wildly with them. I was attacked with clubs, poles, metal chairs, fists, they strangled me and tried to throw me over the right side of the *Mavi Marmara*. I got down into a half-kneeling position and I held onto the railing (the rail of the ship). I realized my life was in danger and they're trying to kill me and throw me over in order to wipe me out. I felt that I was fighting for my life and that this was not a game of stopping a ship, but a battle for my life, and so I fought back hard.

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526 Testimony of soldier no. 4, *Id.*, at 1-2.
527 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. P.

> At this stage I felt a strong blow to my abdomen on the left side and I realized that it was likely that I had been wounded by a bullet in my abdomen...."[528]

It should be noted that soldier no. 2 was indeed injured by a bullet wound in the abdomen, he underwent two surgeries, and he required physiotherapeutic rehabilitation.[529]

Soldier no. 5 was injured by severe violence used against him, including live fire into his right knee and stabbing with a knife. The soldier stated:

> "I landed with my feet onto the deck, while I'm throwing off the rappelling gloves. I start to take blows from metal poles, and I also clearly discern a terrorist with an axe in his hand. I withdraw about four to five meters towards the stern in order to distance myself from the encounter by the rope, and a group of about six (and it felt like more) pursues me toward the stern. I clearly remember what the people had in their hands: there were three people with metal poles which were light-blue (the color of the ship). At first, I didn't realize what they were. I thought maybe they were a type of toy, but as soon as I got hit with one of the poles, I realized that they were metal poles. There were two people with knives drawn, running after me with the intention of stabbing me, and another person with a crow-bar - a tool made of metal, about a half-meter long, which was sharp on one end and flat on the other [...]
>
> I'm surrounded by six people and another person who arrives a few seconds later. This person has a large camera tripod in his hand and he joins the terrorists and beats me with the tripod. My situation at this point is that, as I said, I'm surrounded by terrorists. They're beating me with poles. I'm getting hit all over my body. I take several blows to the face with the metal poles. I take many blows to the head, my head is protected by the helmet (after the battle was over, my helmet was completely smashed). I am getting blows to my body, which is protected by my ceramic vest. I'm trying to protect my face with my arms and my arms are getting beaten. One of my arms breaks [...] I am trying with this hand to take out my pistol, which is fastened to my leg in a holster, but I don't succeed, because they see my attempt to draw the pistol and they stop me by hitting my hand with metal rods. The fighting continues a little longer, and at this stage I realize I'm not managing to withdraw the pistol. I try to find a solution, and then a terrorist runs towards me with a knife drawn and

528 Testimony of soldier no.2, *Id.*, at 2.
529 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. P.

stabs me with full force in the chest. What stops the knife is the ceramic vest I'm wearing. The terrorist who tried to stab me seems surprised that the knife was stopped by the ceramic shield and I push him off of me with a blow towards his head. I realize that I need a weapon to defend myself. I run toward one of the terrorists who is attacking me, I grab the iron pole from his hand, and I use it to start striking back at the terrorists who are surrounding me - blows with the iron pole in my hand. I felt that from the moment I took the iron rod the blows increased. I started to feel their impact and it was hard for me to breathe. I also started to feel dizzy. At this stage, I feel a cut in the area of my ear or head, it isn't clear to me exactly where. I turn and see someone with a knife - I hit him with the iron rod and the person falls. When I turned towards the terrorist with the knife, my back was left exposed and the terrorists who were behind me struck a number of blows in the area of the back of my neck. I retreat a few steps and at this stage I stumbled; my right leg buckled under. I fall to the deck. I fall where underneath me there is an open entrance - the hatch on the right side of the roof. It's about a meter wide. The people above are trying to push me down through the opening to the level below, and, at the same time, they are trying to pull me down from below. I manage to see that underneath me on the deck a mob of people have gathered. I realize that, in a situation like this, I cannot let the terrorists push me downwards. I roll about a meter to the side in order to distance myself from the opening. At every stage, the blows with the poles continue, non-stop. I get hit in the head, the abdomen, and the legs. After I manage to get away from the hatch, I take a number of blows to the head and the back of my neck, and I lose consciousness. The next stage that I remember -- when I awoke from a very strong pain in my knee, I see soldiers from the unit under my command putting a tourniquet on me. During a number of minutes, I alternate in and out of consciousness. I hear a report by the soldier who is the commander of the medical team, transmitting a report about my condition. At this stage, I realize for the first time that I have been shot in the knee. I also realize that I have a slash in the ear and a slash in the head, and fractures in my arm, because my arm is distorted and I have severe pains in the elbow."[530]

Soldier no. 5 was indeed injured, *inter alia*, by a bullet shot in the knee (and he also suffered from blunt trauma to his head and abdomen, a

530 Testimony of soldier no.5, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2-4; See also testimony of soldier no.6, *Id.*, at 2; Testimony of soldier no. 6, *Id.*, at 3; Testimony of soldier no. 7, *Id.*, at 1; Testimony of soldier no. 8, *Id.*, at 2; Testimony of soldier no. 9, *Id.*, at 1;

fracture in his right hand, a wound to his right ear and hemorrhaging in his ear drum), and he underwent surgery after the event.[531]

The extreme violence which was inflicted upon the soldiers when they fast-roped from the first helicopter onto the roof of the *Mavi Marmara* is also described in the statements of soldier no. 6,[532] soldier no. 7,[533] soldier no. 8,[534] soldier no. 9,[535] soldier no. 10,[536] soldier no. 11,[537] soldier no. 12,[538] soldier no. 13,[539] soldier no. 14,[540] and soldier no. 15.[541]

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531 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. P.

532 See testimony of soldier no. 6, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2-3; In his testimony he described that upon his arrival to the Marmara a chair was thrown at him by one of the men on deck and this struck his face, another man attempted to choke him and he was severely beaten on the head until he fell to the deck bleeding. Likewise, an attempt was made to push him to the side of the ship and throw him to the lower deck.

533 Testimony of soldier no. 7, *Id*., at 1; The soldier describes in his testimony that immediately after a chair was thrown at him by one of the "activists" (as he called them), another struck him in the head with a club, and so he fell to the ground and was beaten while lying on the floor.

534 Testimony of soldier no. 8, *Id*., at 2; According to the soldier's testimony immediately upon his arrival on the *Mavi Marmara*, three "terrorists" (as he called them) jumped him and beat him with clubs and attempted to choke him and break his neck.

535 Testimony of soldier no. 9, *Id*., at ; In his testimony he describes how he was beaten with a crowbar in the head until his helmet came off and he fell to the ground. While lying on the floor he was beaten by about five people with bars, a chair, and their bare hands.

536 See testimony of soldier no. 10, *Id*., at 1-2; In his testimony he describes that upon reaching the roof of the *Mavi Marmara* he was attacked by 4-5 "terrorists" (his term) who did not stop hitting him with bats/ metal sticks/ axes and attempted to push him to the side of the ship and thrown him to the deck below. He goes on to describe how he was unable to reach the weapon which was secured on his back, and so withdrew into himself in order to lessen the severity of the injuries.

537 Testimony of soldier no.11, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 1; In his testimony he describes running towards a number of participants who were beating one of the soldiers and they attacked him, beating him in the head and breaking his hand. Likewise he describes how a chair thrown at him broke the paintball gun he held (the gun was out of Commission and could not be used).

538 See testimony of soldier no. 12, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1-2. In his testimony the soldier describes a chair being thrown at him and an attempt to stab him in the hand with a knife.

539 See testimony of soldier no. 13, *Id*., at 2-3, where he describes a sensation of mortal danger and of a minority of soldiers facing a large number of violent activists. The soldier also described how he was caught by three resistors, one beat him with a metal bar, the second pulled him powerfully and made him dislocate his shoulder, and the three attempted to throw him over the side to a lower deck of the ship.

540 See testimony of soldier no. 14, *Id*., at 1, where he describes how he noticed upon his descent to the roof of the Marmara that the soldiers in his force were surrounded, each separately, by a number of resistors armed with cold weaponry. He also described that he noticed one resistor aiming a revolver at several soldiers.

541 See testimony of soldier no. 15, *Id*., at 1-2, where he describes how he noticed each one of the soldiers was surrounded by 3-5 activists, some of the soldiers were lying on the floor. The soldiers were beaten with clubs and metal bars. The soldier also saw one axe being used by the resistors. He goes on to describe two resistors running towards him with

135. In addition to the violence that the IDF soldiers encountered on the deck of the *Mavi Marmara*, the three soldiers who were abducted and taken below the deck of the ship by the IHH activists (soldier no. 1, soldier no. 3 and soldier no. 4) also stated that while they were held below deck, approximately forty minutes in duration, their equipment and weapons were taken from them, they were beaten, and the necessary medical treatment required in their condition was withheld from them.

Soldier no. 1, who was attacked and thrown onto the lower deck (a height of about 3.5 meters), stated that while he was held below deck, he was beaten on the head with clubs and IHH activists strangled him. Soldier no. 1 also stated that although he had a very deep cut on his scalp, the doctor who treated him only wiped the blood from his forehead. He described the events as follows:

> "When they brought me inside [below the ship's deck], I realized that here my physical resistance would be futile and that I would not be able to fight them all, so I just looked for an opportunity to escape and jump into the water. At this stage, I was certain that I was going to die, and all kinds of scenarios started running through my mind: being executed by the mob, being executed and it being photographed to distribute around the world and show their achievement; abducting me and bringing me into Gaza (Gilad Shalit), etc.
>
> At this point, I tried to think of ways to escape, like jumping into the water, jumping out of a porthole, etc. Afterwards, they dropped me further down below deck, while photographing me many times (video, stills, a real "press conference") and they continued to hit me, mostly in the head and mainly using clubs. With every blow I took to my head, I was worried that I would faint, or worse, that I would die. During all of this movement below deck, one enemy strangled me from behind and twisted my arms from the back, while we were moving, so that everyone who passed by me made sure to strike at me and take part in beating me.
>
> After descending half of the staircase, I began to call, "Doctor, Doctor," and a doctor was brought to me. At this stage, I had a very deep slash in my head. The doctor "treated me" in front of the cameras, when actually the only thing he did was to wipe the blood from my forehead. He didn't touch the injury to my skull at all. [Subsequently, at a hospital in Israel, he was diagnosed with a very deep scalp wound and a fractured skull; the slash required 14 stitches.]. Afterwards, they took me below to the

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metal bars in an attempt to hit him, since he managed to get away, but in the end was struck on the hand (apparently by a different resistor).

> passengers hall and lay me down on the couches, and one of the enemies guarded me while waiving a club over my head. I asked for water because I thought I was going to faint from the loss of blood. At first they didn't bring me water, and only after about 10-15 minutes they brought me water."[542]

Soldier no. 3, who, as noted, was wounded by being stabbed in the abdomen with a knife, described being dragged below deck, while being beaten and his hands being pulled every time they grabbed onto something. The soldier also described his injuries at this stage - massive hemorrhaging from the abdomen with his intestines protruding, a deep slash on his left arm and blood streaming from his nose. According to his statement, a doctor who saw him at his request gave him only a gauze pad in order to treat his injuries, and he held the pad against his abdomen with his underwear. Soldier no. 3 also described that, below deck, his hands and feet were bound and he described the fact that a guard with a wooden pole was stationed by him. As he described it:

> "At a certain stage, a number of people drag me into the ship. What's running through my head is that they're dragging me into the ship in order to kill me. I try to resist and to grab at anything along the way. Every time I resist, I get severely beaten. At the first stage, they are dragging me inside from the side into the staircase. Before they start to bring me down the stairs, they take my equipment off of me. I resist with all my strength, without success. I recall a lot of shouting there, madness in the people's eyes, hate. I realize that this is the end of me, and that they're going to kill me. They start dragging me into the stairwell, two people, one from above and one from below. I try to grab onto the banisters and the railings, the whole way - because I realize that, as soon as I get below and reach the lower level, they're going to kill me. I hear the second helicopter arriving, I hear voices, shooting, and explosions on the deck, and I hope that within a short time they'll come to rescue me, and I realize that this is my chance to stay alive. Every time I grab onto something, my hands get burns (the marks on my hands are still visible today).
>
> While they're taking me down the stairs, my pants fall down and my shirt rises up - I see that I am bleeding massively, that is, I'm losing a lot of blood, and I can tell that part of my intestines are protruding (today I know that they came out as a result of pulling the knife out of my abdomen). I also notice a deep cut in my left arm, from which I'm also losing a great quantity of blood.

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542 See testimony of soldier no. 1, *Id.*, at 2-4.

I also feel blood flowing from my nose into my mouth. At this stage, I have no head covering because they removed it from me after they took off my equipment.

During the descent in the staircase, I identify soldier no. 4 lying on the lower level, surrounded by a large number of crazed people, while he's continuously being beaten. They're continuing to drag me down the stairwell - while doing so, my pants fall down and my shirt rises up. At this stage, they move a bit away from me, and I find myself surrounded by people with cameras, video and stills, and they photograph me a number of times, with photos and flashes. At this stage, I ask for a doctor and point to the cut in my abdomen. I receive a gauze pad, which I press against the wound in my abdomen and hold in place using the elastic of my underpants.

My picture of the situation at this point is like this. I was dragged two flights down the stairwell, I'm lying in the staircase - opposite the entrance to this level of the ship. Soldier no. 4 is lying at the entrance to this level, surrounded by people who, on the one hand, are photographing him and me, and at the same time they're continuing to beat him.

Two people I remember from this stage were wearing (green) Hamas flags wrapped around their heads, who were very eager to kill us. They tried to strangle me and soldier no. 4. The hate in their eyes was just burning. They told us in English that they were going to kill us. Apparently, what stopped them from succeeding was the people who prevented them from doing it. They pushed them away from the area.

Afterwards, they continue to drag me down another level through the stairwell, and they bring me into a large hall. Upon entering the hall, I identify soldier no. 1, whose entire face is covered in blood. They lay me down on a couch opposite soldier no. 1. The hall is large, with many couches and dozens of people in the hall. There are women in it, with covered faces, who are taking care of the wounded people, but not us. Just after they bring me down, they bring soldier no. 4, and lay him down on the couch next to me.

The current situation is that the three of us are in the hall on three couches. Soldier no. 1 is sitting, soldier no. 4 is lying down, and I'm lying down on the couch opposite them, at a distance of about three meters.

They tied my hands and feet with rope. They station a person above me who is holding a wooden pole in one hand, and with his other hand he's holding onto my arm. He beats me with the wooden pole, and he indicates to me with his hand to be quiet, and that any movement by me will result in harsh blows with

> the wooden pole. Apparently as a result of the loss of blood, I started to become groggy. I notice a group congregating around soldier no. 4, I look in his direction and I see that they are sitting on him and beating him with harsh blows. Soldier no. 4 starts to convulse. Both soldier no. 1 and I started shouting in English for the doctor.
>
> At this point, the activists brought water and poured it over his face and he stopped and lay down quietly. I was sure that at this point he was dead."[543]

Solder no. 4, the signal operator for soldier no. 3, suffered convulsions and lost consciousness while he was below deck due to the blows to his head. As he stated:

> "About 20 people were waiting there with poles, axes, and other [weapons], and as I fell (this seemed to me to have been planned), they grabbed me and dragged me into the ship. I notice knives and they cut all of my equipment off of me, and they're also beating me the whole time, during which time I saw soldier no. 3 after they had stabbed him in the abdomen. I tried to get to him and to help him, and he indicated to me to be calm and not do anything crazy, so that they wouldn't injure me further. They took us down - I was pretty foggy - through the stairwell into the ship below deck. They brought us into a room, during which time I heard all kinds of shouting, which wasn't clear, but it sounded to me like Haneen Zoabi. I got to the room and on the way there I was beaten the whole time. In the room, there were many blue couches. They lay me down on one of the couches. There were two people, one of whom beat me the whole time while I was tied to the couch, and they also held me, and, during this, the guy continues to beat me, and there was another guy who tried to calm him down, but it didn't help. At this stage, I felt foggy and not good, I felt my head. I saw soldier no. 1 with his hand on his head, covered with blood, and one of the terrorists, while one of them was sitting on me the whole time (or this was the same one with a pistol in his hand) and whispering things to me the whole time in Arabic, and I realized that it seemed like I was going to die. At this point, I lost consciousness (from my friends' description, I also started to have convulsions).[544]

In a 34-second video taken by one of the flotilla participants, soldier no. 1 is seen inside the ship below deck, bleeding from his head and groaning in pain, while he is being guarded by an IHH activist wearing

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543 See testimony of soldier no. 3, *Id.*, at 3-5.
544 See testimony of soldier no. 4, *Id.*, at 2.

a life jacket and a gas mask and holding a large wooden club.[545] In a 20-second video, soldier no. 4 is seen lying on the floor, inside the ship below deck, while an IHH activist with a protective vest and an iron rod is holding him. Other people are seen who are photographing the soldier.[546] In another video, soldier no. 3 is seen while he is being forcibly dragged down the stairwell into the ships' interior by an IHH activist wearing a protective vest and a gas mask. The soldier is seen trying to hold onto the banister, he is forcefully pulled off, an IHH activist strikes him, and the soldier is bleeding from his nose.[547]

136. It should be noted that the statements of the three soldiers who were abducted indicate that the flotilla participants on the *Mavi Marmara* were divided into two groups: (i) the IHH activists and their supporters, those same participants who seized the soldiers on the roof of the *Mavi Marmara* and took them below the ship's deck, while withholding appropriate medical treatment from them; and (ii) the other participants whom they encountered below deck, who tried to protect them and improve their situation.

> Soldier no. 1 stated about this:
>
> "At this stage, I noticed that there were two types of people in the room:
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> 1. Terrorists - very large and strong men, approximately ages 20-40, armed with cold weapons,[548] [footnote added] running back and forth and appearing as if they're in the middle of a military operation. Some of them spoke into Motorolas, transmitted reports within the ship and, other than not having uniforms, looked and acted like a military force in every respect.
>
> 2. The relatively moderate people - slightly older men and women who showed restraint, relatively, and did not attack me.
>
> I noticed that there was a disagreement between the two groups; the terrorist group wanted to attack me and kill me, while the moderate group tried to protect me. At this point, I was worried that someone from the terrorist group would succeed in getting to me and shooting or stabbing me to death."[549]

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545 See file "M2U00007" on CD marked as exhibit 159 of the Commission's exhibits, received on Dec. 30, 2010. This event from a different point of view is also documented in another video, see "M2U00008", *Id*.

546 File "M2U00011", *Id*.

547 File "Hayalim" (01:06), *Id*.; See also "M2U00012" (17 seconds), *Id*.

548 The term "cold-weapon" is defined in the Even-Shushan Dictionary (Concentrated) (Hebrew) as a weapon that can injure or cause death by means of stabbing, or hitting, thus a weapon that does not have materials that produce fire or heat as the result of the use of gun fire (as opposed to a "hot weapon").

549 See testimony of soldier no. 1, *Id*., at 3.

Soldier no. 3 also stated:

> "There were two groups there, the one which tried to kill us and was just waiting for the moment when they would succeed. There was another group there which tried to calm things down, and they were actually the ones who prevented the extreme group from killing us."[550]

Soldier no. 4 stated:

> "It is important to note that when I was below the ship's deck they tied me up, and there was one who pulled my hair the whole time, whispered all sorts of things in my ear, and beat me with clubs, and, simultaneously, there was one who restrained him the whole time."[551]

At this point, it should be noted that the chain of command was not fully aware of the abduction of the three IDF soldiers immediately upon their capture, but only after some time had passed. The material obtained by the Commission indicates that the aerial lookout discerned the dragging of soldier no. 1 and his fall from the roof to the lower deck as the events took place, and he reported over the radio his concern that soldier no. 1 had been abducted by the IHH activists on the *Mavi Marmara*. Thus, by means of a radio report at 4:39 a.m., the aerial lookout reported his concern to the Commander of Center A, and even asked him twice whether a soldier was missing on the ship. The Commander of Center A responded that he did not have contact with the force from helicopter no. 1 and therefore he could not respond.[552] Likely, the Commander of Center A understood that soldiers were missing from the force after the third helicopter arrived, as described below (between 4:46 a.m., when fast-roping from the third helicopter began, until 5:07 a.m., when the command was given to board the *Mavi Marmara* from the Morena speedboats.) The commander of the force on the second helicopter (hereafter: **soldier no. 21**), stated that when he realized for the first time that soldiers no. 1, no. 3 and no. 4 were near the bow of the ship (at approximately 5:13 a.m., as

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550 See testimony of soldier no. 3, *Id.*, at 6.

551 See testimony of soldier no. 4, *Id.*, at 3.

552 The sounds over the radio regarding the absence of soldier no. 1 can be heard on file "Neshek Ham.mov" in folder *Air, Navy Data Disc, supra* note 5. The time of communication between the aerial look-out (Tzofit) and the Shayetet 13 Commander can be seen from the clock appearing on the visual device; See also the testimony of Shayetet 13 commander, *Inquiry Expansion of 20.9.2010, supra* note 451, at 4, according to which "at this time I cannot establish radio contact with the commanders on board the deck in order to receive a report from them regarding the status of the force, in retrospect it was because all six soldiers or commanders who descended first from the helicopter were injured in one way or another and were in a situation where they could not talk to me."

described below), he was surprised because he had not known anything about soldiers from the force being missing.[553]

On this issue, the Chief of Staff, General Gabi Ashkenazi, testified before the Commission that the soldiers on the vessel and the commanding forces nearby only realized that the three soldiers were missing after about fifteen minutes.[554] The Chief of Staff added: "From our perspective, it is entirely clear that there is a lesson here, that we should have known about this earlier."[555]

137. *The second helicopter.* The soldiers who fast-roped from the first helicopter did not respond to the radio transmissions directed to them. Therefore, at this stage, the Shayetet 13 commander ordered another helicopter to the *Mavi Marmara* (hereafter: **the second helicopter**), which had been designated in the operation's plan as back-up for the first helicopter. There were 12 soldiers on the second helicopter. At 4:36 a.m., fast-roping began from the second helicopter, using two rappelling ropes.[556] The commander of the force on the second helicopter received a report from the commander of the medical team for the force on the first helicopter (hereafter: **soldier no. 15**) about the condition of the wounded and began moving towards the forward part of the roof, where, according to the soldiers' description, the IHH activists who had attacked the first helicopter's soldiers were gathered. The team advanced to the edge of the roof while searching the IHH activists, and a number of soldiers remained in order to secure the area. Upon reaching the edge of the roof's porch, the commander of the force stationed a few soldiers in positions controlling the roof, and ordered them to guard over the lower decks. One of the soldiers tried to descend through the roof's opening (the hatch) in order to get to the ship's bridge, but he encountered resistance. The commander decided to handcuff the participants on the roof in order to free additional soldiers for the mission of descending to the bridge. He stated: "I realize it's necessary to free up soldiers to expand the team descending below deck, and so we decided to handcuff the terrorists on the roof. I gave

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553 See testimony of soldier no. 21, *Id.*, at 4.

554 Transcript of session no. 13 "The Open Door Testimony of the Chief of Staff" (Oct. 24, 2010), at 32-33 [hereinafter *Chief of Staff's Open Door Testimony of 24.10.2010*]. It should be noted that in the Eiland report, it is stated that the forces were not aware of the abduction of the soldiers until after 43 minutes had passed, see *The Eiland Report*, supra note 402, at 106. It appears as if this statement is correct with respect to most of the force, however, as mentioned - and this is probably what the Chief of Staff referred to in his testimony - some understood that at least one soldier had been abducted prior to that.

555 *Id.*, at 33; See also *The Eiland Report*, *supra* note 402, at 112.

556 The time of the descent's start was estimated according to the clock on the visual device (Tzofit); See video file "Neshek Ham.mov", in folder *Air*, *Navy Data Disc*, *supra* note 5.

the order to handcuff the terrorists who were lying on the deck, and I handcuffed them while they were lying on their stomachs. I handcuffed their hands behind their backs so that they would be neutralized and no longer present a threat to the unit, and it would be possible to reduce the number of guards securing them."[557]

It should be noted that at this stage, the Commander of Center A approached the *Mavi Marmara* in the Morena speedboat and tried to transmit a message to the soldiers on the roof using a megaphone. According to his testimony, the order given to the soldiers on the roof was 'to move to the bridge, while using live fire if needed. I ordered the soldiers that in case there is a danger to their lives, they should shoot to hit the activists that are endangering the force, but for those who do not constitute a threat to their lives, shoot at the legs.'[558]

138. *The third helicopter.* At this point, the Shayetet 13 commander ordered the third helicopter, which had been designated to take control of another ship (the *Defene Y*), to alter its destination and fast-rope onto the *Mavi Marmara* to assist the forces there (hereafter: **the third helicopter**). At 4:46 a.m., fast-roping using two ropes commenced from this helicopter, on which there were 14 soldiers. The team secured the perimeter of the roof and toward the lower decks,[559] and made contact with the commander of the second helicopter, who gave them an assessment of the situation. The commander of the force (hereafter: **soldier no. 18**) decided to advance towards the bridge.[560] It should be noted that this force was not calibrated on the same radio frequency as the other teams, due to the change in their mission. Therefore, soldier no. 18's contact remained on the roof with instructions to make contact with the Commander of Center A or the commander of the operation, and report about the condition of the wounded. A small team remained to secure the roof near the opening to down below. The order given to this team was to shoot toward the ship's body (into the clear area) to deter the activists and, in the event of any danger to the forces, to shoot at the threat.

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557 See the testimony of soldier no. 21, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3; It should be emphasized here that we are dealing with the takeover stage exclusively.

558 See testimony of the Commander of Center A, *Id.*, at 2; At the same time, in the completion response on this matter the Commander of Center A mentioned that in his estimation these calls were not heard by the soldiers on board the ship, since they did not approve or in any way acknowledge that they had received the order (see *IDF Completion Response to the Commission's Questions of 29.11.2010*, at para. 6, marked by the Commission as exhibit 147).

559 See testimony of soldier no.18, *Id.*, at 1; The reference is to a sector free of people and for purposes of determent and prevention of the advancement of people towards the sector.

560 See testimony of soldier no. 18, *Id.*, at 2.

The Takeover of the Bridge

139. Soldier no. 18, commander of the takeover force on the third helicopter, mobilized his force and began preparing for the descent. During the descent, a door on the body of the ship opened at a distance of approximately two meters from the force, and two activists came out. According to the force commander's statement, they were armed with clubs and axes. The force shot live fire at one of them, he was wounded, and the second IHH activist dragged him back inside and closed the door. Soldier no. 18 shot several rounds through the window of this door, toward the ship's inner wall. On their way to the bridge, the force identified two more IHH activists with clubs. One of the soldiers in the force shot the two IHH activists in the legs. Upon reaching the area of the bridge, soldier no. 18 gave the order to enter while firing, and also shot a number of live bullets into the area clear of people. The force charged onto the bridge, where there were five people in addition to the captain of the *Mavi Marmara*. Those who were present on the bridge did not provide resistance to the takeover of the bridge, although, from an inner corridor of the vessel, marbles and screws were shot at the IDF soldiers from a slingshot. Soldier no. 18, the force commander, gave the order to shoot into the inner corridor, and if the shooting continued, at the legs of participants holding slingshots. This event is also described in further detail below.

Soldier no. 18 ordered the captain of the *Mavi Marmara* to stop the vessel. Everyone on the bridge, other than the captain, was handcuffed.[561] The captain issued an announcement over the vessels' public announcement system that the ship was no longer under his control, but was instead under the control of IDF soldiers, and he ordered all of the passengers to go inside the ship.

Boarding by the Soldiers from the Morena Speedboats

140. While these events were taking place on the *Mavi Marmara* itself, the naval force continued trying to board the ship. From its location at sea,

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561 Soldier no. 9 testified that during the takeover of the bridge they instructed the captain of the Marmara to stop the ship and the latter started talking in Turkish on his internal radio; Soldier no. 9 went on to state in his testimony that he found out that the captain gave an order to sabotage the ship. In fact, there was indeed a technical malfunction on the ship which was identified by a Navy Engineer Officer as a deliberate malfunction. See testimony of soldier no. 9, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; See also *IDF completion response of 15.11.2010*, *supra* note 400; Testimony of Chief [Engineer Officer] of the Bat Yam [Navy ship], *Id*; Soldier no. 9 also mentioned that the captain, who was wearing a Kevlar vest, remained at the ship's wheel and began cursing the soldiers and demanding they get off the ship.

the force could see some of the events taking place on the *Mavi Marmara*, but with only a partial view due to its location. At a certain stage, the naval force on the Morena speedboats even saw a person thrown from the roof onto the lower decks.[562] Attempts to establish contact with the soldiers on the roof of the *Mavi Marmara* failed. Before the arrival of the third helicopter, and after receiving the radio report that there were two injured on the roof, the Commander of Center A instructed the first Morena speedboat to approach the bow. The force encountered resistance from water hoses, poles, glass marbles, etc., and another attempt to raise the ladders in order to climb aboard failed.[563] The Commander of Center A decided not to approve live fire at this stage, and to wait for the third helicopter to stabilize the situation and clear the side. The Commander of the Takeover Force on the second Morena stated that he heard shooting on the roof and requested permission from the Shayetet 13 commander to open live fire. The Shayetet 13 commander refused to give approval for shooting "in order to prevent deaths among the participants of the flotilla."[564]

Additional attempts to establish contact with the force on the roof failed (as stated above, the Commander of Center A, who was aboard the first Morena, tried calling to the soldiers with a megaphone). The Commander of the Takeover Force saw shooting at the navy's boats, but he could not identify the source of the shooting and he did not return fire.[565] The team commander R., who was on the first Morena along with the Commander of Center A, also saw shooting at the Morena, which struck the water near the Morena.[566] At this stage, the names of the wounded were transmitted by radio, and the first unit commander realized that a soldier from the first helicopter was missing.

At 5:07 a.m., the Commander of Center A gave the order for the soldiers on both Morena speedboats to board the *Mavi Marmara*.[567] The Commander of Center A issued an order to use deterring fire against the side of the ship in order to deter the group of IHH activists standing there. According to his statement, the deterring fire did not have the anticipated effect. Therefore, the forces used live fire towards two of the IHH activists

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562 See testimony of soldier no. 20, at 2, as well as the testimony of the commander of center A, at 1, *Id*.

563 *Id*.

564 See testimony of the Commander of the Takeover Force, *Id*., at 4.

565 *Id*.

566 See testimony of the Team Commander R, *Id*., at 1.

567 See testimony of the Commander of Center A, *Id*., at 1-2; see video file "Neshek Ham. mov", in folder *AirNavy Data Disc*, *supra* note 5.

who were throwing various objects towards them.[568] The soldiers on the second Morena boarded on the right side, without engaging in any live fire.[569] The shooting led to the dispersal of the people at the vessel's stern.

The forces from both Morena speedboats boarded the *Mavi Marmara*. The Commander of Center A directed the Commander of the Takeover Force to secure the openings, realized that the takeover of the bridge had been completed, and went up to the roof to assess the situation of the forces which were there. The assessment he obtained was that the unit had two wounded and two soldiers missing.[570] The force prepared to descend to the halls to locate the missing soldiers. At this stage, and after the report by the ship's captain over the loudspeaker system that the vessel was under the control of IDF soldiers, a report was received about the events taking place at the bow -- the three soldiers who had been abducted were brought out and taken to the bow. Soldier no. 3 described in his statement that shooting was heard at this time.[571] Soldier no. 21, the force commander of the second helicopter, described in his statement that there was shooting from less-lethal weapons at the violent activists who were holding soldiers no. 1, no. 3, and no. 4.[572] Two of the soldiers, soldier no. 1 and soldier no. 3, took advantage of the opportunity, jumped into the water, and were picked up by the navy's first Morena speedboat from there they were transported to the INS Hanit missile ship.[573] Soldier no. 4, who had a serious head injury, remained on the bow. The Commander of Center A and soldier no. 21 reached soldier no. 4, conducted a preliminary medical examination, and the Commander of Center A gave the order to evacuate him to the roof.

Regarding the events which took place at that time, soldier no. 1 stated:

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568 See the testimony of Commander of Center A, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; See also the testimony of Commander of Center A, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2.

569 See the testimony of Commander of Center A, at 2, as well as the testimony of the commander of the takeover force, at 4, *Id*.
Video file "VIDEO_100530_003.asf", in folder *cd11* in folder *sea*, *Navy Data Disc*, *supra* note 5. There is another video taken by the IDF forces, where the gathering of resistors at the stern was documented, their scattering at one moment (the shooting from the direction of NSW boat 1 was not seen), and the ascent of the soldiers from the NSW boat to the Marmara; See: CD 5 *Takeover of the Mavi Marmara*, in a folder marked as exhibit 90 by the Commission.

570 See the testimony of Commander of Center A, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2.

571 See testimony of soldier no. 3, *Id*., at 5.

572 See testimony of soldier no. 21, *Id*., at 4.

573 See testimony of soldier no. 1, *Id*., at 5.

"After some time, the ship's captain was heard saying over the loudspeaker system that the ship was now under the control of the soldiers, and that they are using live weapons, and that all passengers should go below deck. This announcement caused a lot of agitation below deck, and the mob began shouting "Allahu Akbar" and began to incite each other. Afterwards, they brought us and sat us down against the bow of the ship. At this point, I saw that soldier no. 4 was not walking on his own, but instead was being dragged. Two people were also dragging me. At this stage, I thought they were going to execute us at the bow of the ship, as an act whose purpose from their perspective was to execute one soldier (me) and to threaten that they would do this to the other two if they weren't permitted to enter Gaza.

After about ten seconds, they opened the door and brought me out towards the bow. The guard bringing me out held me a little less tightly, and he was waving with his hand to the right and to the left in the direction of our boats, which I understood was to show our forces that they were holding soldiers in their custody. I took advantage of the opportunity that he was holding me with only one hand, and relatively loosely. I jabbed my elbow into his ribs and jumped into the water. While I was trying to jump, the guard tried to grab me, but I managed to free myself and I fell into the water. I did this because I realized that this was the only way to save my life. As soon as I reached the water, I dove underneath, so that they would not be able to hit me from the ship. I took off my shirt while diving and swimming, and I intended to swim and dive rapidly in a "zig zag" to escape from the enemy on the ship. After my first dive, I rose to the water's surface and I saw a Morena speedboat approaching me and soldier no. 3 next to me, since he had also jumped from the ship, after me. The Morena arrived. We weren't able to climb aboard it on our own, and we were pulled up by the members of our force. The medic on the Morena began treating soldier no. 3. I looked back at the vessel and I saw soldier no. 4 leaning on the side of the ship, completely dazed / semi-conscious. I picked up an M-16 rifle that was in the Morena and I began shooting in the air into the clear area, and this was because I was concerned that the mob on the ship wanted to abduct soldier no. 4 back into the ship, and I wanted to deter them.

I shouted to soldier no. 4 that he should jump into the water, but at this point I saw several soldiers from our forces were joining up with soldier no. 4. Afterwards, I learned that soldier no. 4 suffered from a fractured skull and compression, and that the operation which the unit paramedic performed on the deck of the *Mavi Marmara* saved his life. Afterwards, the Morena

transported soldier no. 3 and me to the INS Hanit missile ship. As the Morena speedboat moved toward the missile ship, we passed by the commander on the Zaharon boat and I shouted to him that the terrorists had possession of the equipment and weapons of the three of us (soldier no. 3, soldier no. 4, and me).[574]

Soldier no. 3 stated:

"We lay there for what seemed to me something like an hour and a half (in hindsight I know that from the moment we fast-roped until I got outside, 43 minutes passed)....

The shouting continues the whole time, there is a lot of noise, many people are involved with us and shouting at us. At a certain stage, the announcement of the ship's captain is heard. The captain shouts to everyone to go inside all of the rooms. After the captain's announcement, a lot of stress and panic is created. There are people around us who are shouting and cursing the whole time, as I stated. The people are looking out the windows the whole time.

At the next stage, my guard is replaced by another guard. The new guard lifts me up. I ask him to undo the ties at my hands and legs. He releases the ties (the rope) for me, and he begins taking me to the bow, with the distance between us and the exit to the bow about 50-70 meters.

The move toward the bow is done through the hall. While we're moving, the guard is trying to strangle me. Every time I feel that I don't have any air, I try to shout and people release me from him, and they don't allow him to succeed in strangling me.

This attempt to strangle me was made several times. It is important to state that they brought soldier no. 4 before me, two people grabbed him on each side. He couldn't walk. They just dragged him along and lay him down on a couch by the door which exited onto the bow. They sat me down next to him and, while they're sitting him up, I see that someone is taking soldier no 1 outside. I rise up forcefully to try and go outside along with them, and I find myself outside with soldier no. 1.

I find myself outside together with soldier no. 1 and the "Turkish guard". I hear shooting, I turn around and I see the "Turkish guard" fleeing back inside.

Soldier no. 1 and I run to the side of the ship, jump into the water from a height of 12 meters, and start swimming toward our boats, toward the Morena speedboats. We climb aboard the Morena,

574 See testimony of soldier no. 1, *Id.*, at 4-5.

where they start treating me, and from there they transfer me to the missile boat, and from there by helicopter to the hospital."[575]

Soldier no. 20, who was on one of the Morena speedboats which picked up soldiers no. 1 and no. 3, who had jumped into the water, stated:

"At this stage, we approached the right side of the *Mavi Marmara* (the back third) and, while we're approaching, I see two people jumping into the water (two figures) from the right side of the bow. It was already daylight. To the best of my recollection, the *Mavi Marmara* was no longer moving.

We didn't know who the two figures were who had jumped, and we approached with our weapons ready and identified soldier no. 1 and soldier no. 3.

Soldier no. 1 swam towards us rapidly. He reached us, and we saw him, and that his whole face was swollen and beaten and his head was open and his hand was also injured.

We saw that soldier no. 3 was swimming with difficulty. We looked at him. He said that his abdomen was cut and that he can't climb.

We lifted him into our boat. We saw that his arms were full of cuts, his face was swollen from blows and smashing, and he had an open slash in his abdomen from which his internal organs were protruding. He looked like he was in critical condition.

At the same time, we looked at the place where they had jumped from, and we saw soldier no. 4 leaning on the side of the *Mavi Marmara*, with his eyes open. We called to him and he didn't react. We realized that he was critically wounded.

At this stage, the boat of the naval command approached us and he told us that he would continue dealing with (taking care of) rescuing soldier no. 4 and that we should evacuate the wounded."

Soldier no 21 the commander of the force on the second helicopter, stated as follows about the shooting with less-lethal weapons, which enabled the escape of soldiers no. 1 and no. 3, and also about the situation of soldier no. 4:

"I was stationed at the left side of the roof, and suddenly I heard shouts from the right part of the roof: "They're taking soldiers no. 1 and no. 3 with them". At this point, daylight broke.

We employed the shooting of less-lethal weapons at those who had abducted them, by the soldiers who saw the event, and immediately afterwards I heard a shout: "They jumped into the water." I reach the right side of the roof and I see soldier no. 4

575 See testimony of soldier no. 3, *Id.*, at 4-5.

leaning on the railing of the ship on the right side of the open deck (the lower deck). I can't tell that he is wounded, but I see that he is only in uniform without any equipment. I was in shock, I kept my eye on him, I didn't know that soldiers from our unit were missing.

I realize that apparently not all of the decks had been searched yet, and now I'm on the bridge deck, one level below, and he is three levels below us, and I shout to him to jump into the water. I see that he doesn't react, he looks dazed, but he doesn't react at all. At this stage my second-in-command and I jump down in order to get to him. After we have gone down one level, I reached the second level, and there I see that the corridor is full of people. I leave my second-in-command, and I go down the stairs to the open deck and approach soldier no. 4.

I immediately realize that he is not conscious. I see signs of trauma to his face. I move him away from the side, lay him down on the deck, and, at this point, the commander of the force arrives, together with his signal operator. He asks him if they shot him and if everything is okay. Afterwards, I pick him up and take him up to the treatment site for the wounded, where I met the paramedic, who instructed me to lay him down."[576]

Taking Care of the Wounded

141. The soldiers' statements indicate that the soldiers treated the wounded throughout the whole operation.[577] After the takeover of the vessel was completed, at around 5:17 a.m.,[578] the stage of treating and evacuating the wounded in a more organized manner commenced. The statements of the medical team indicate that the prioritization for treating the wounded was based on objective medical criteria, such that some IDF wounded only received treatment after the treatment of wounded flotilla participants.[579] There were about 15 wounded IHH activists on

576 See testimony of soldier no. 21, *Id.*, at 4.

577 See for example the testimony of soldier no. 7, at 3 ("I started treating about 15 wounded among the people who attacked us earlier"); testimony of soldier no. 15, at 4 ("the doctors performed operations on them [the reference is to the activists on board the ship who attacked us]. This lasted for 4 hours when they treated all the wounded on the ship"); Testimony of Commander of Center A, at 3; In the testimony the commander describes receiving ongoing reports from the unit doctor treating the wounded, and that every wounded person - including the flotilla activists - received full medical treatment; 669 Unit Commander's testimony, at 2, which describes that when he reached the Marmara he noticed that the wounded had already received first aid and assumed it was administered by the Shayetet soldiers; See also the testimony of the Commander of the Takeover Force, at 7; Testimony of soldier no. 6, at 4-5; Testimony of soldier no. 10, at 2, As well as the testimony of soldier no. 13, at 5, *Id*.

578 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 27.

579 See the testimony of the 669 Commander, *IDF completion response of 15.11.2010*, *supra* note

the roof[580] and eight wounded IDF soldiers, of whom three had critical injuries.[581] The doctor who boarded with the force from the second Morena speedboat stated that he handled the evacuation of a number of IDF soldiers who were critically wounded, and he testified to the critical condition of these wounded.[582] At this stage, the forces realized that some of the flotilla participants in the halls of the vessel were wounded, and thus an order was given to first bring all of the wounded out through the entranceways of the halls. A doctor, a medic, and a medical team were stationed at each of the entranceways and conducted the first examination of the wounded. From there, the wounded were taken up to the roof. At any given time, there were about six or seven doctors on the roof (including the director of an emergency room at Rambam Hospital). Providing medical treatment on the roof were also six paramedics, four medical teams and the soldiers from the rescue and airlift evacuation unit 669 (hereafter: **unit 669**), all of whom are trained medics. During the course of this event, treatment was provided by in total 18 doctors, six paramedics, about 70 soldier-medics and a senior doctor from unit 669, who assisted with the prioritization for evacuating the wounded. The commander of unit 669 stated that, upon his command, the doctors began stabilizing the condition of the wounded. Those wounded who were in stable condition were harnessed into evacuation stretchers, prepared for helicopter evacuation, and transferred to the helicopters. Fourteen field operations were performed on the deck of the *Mavi Marmara*. By 11:40 a.m., 31 wounded flotilla participants had been evacuated, 20 of whom were in critical condition and the rest moderately or lightly injured. The doctor stated that, around 12:00, he personally conducted a search inside the ship, during which he identified himself as a doctor and asked whether there were any more wounded. The doctor also stated that his assistant had conducted a similar search several minutes before him. At this stage, the medical team believed that there were no more wounded aboard the vessel.[583] Retrospectively, it was understood that there were

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400, at para. P; See also the testimony of soldier no. 9, at 4 ("my treatment was performed after the Turkish injured were treated").

580 See doctor's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2.

581 See also *The Eiland Report*, *supra* note 402, at 107.

582 See doctor's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2. It should be mentioned that the doctor testified that "after evacuating all the wounded of our forces we begin treating the wounded among the activists on the roof" (his testimony, at 2). However, from other testimonies it seems that the medical treatment was performed according to objective medical criteria.

583 See doctor's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3; See also the testimony of the 669 Commander, *IDF completion response of 15.11.2010*, *supra* note 400, at para. P.

an additional 14 passengers in the hall who had bullet wounds. These wounds were discovered during the physician's examination which was conducted at the port of Ashdod.

142. The statements of the medical caregivers indicate that some of those injured resisted receiving medical treatment. The doctor stated:

> "During this event, there were incidents of resistance to medical treatment in the middle of treatment, which I had never encountered during any other event. While performing a chest drain (thoracostomy), the wounded pulled the drain out himself, and tells me: "I want to die like a *shaheed*." (NB: The term "*shaheed*" is a word in Arabic whose literal meaning is "witness" but is also used to refer to a "martyr.") [explanation added] Nonetheless, we insisted on treating him and hoisting him up to the helicopter for treatment.
>
> There were many other incidents like that, including pulling out intravenous infusions, etc."[584]

The doctor further noted that not one of the wounded died of his injuries from the moment that the medical treatment began, despite the resistance they encountered during the treatment and the complicated conditions under which the treatment took place, including a lack of certain medical equipment (and equipment that flew into the air due to the motion of the helicopters), the difficulty in transporting the wounded through the narrow corridors of the vessel and from the lower decks to the roof, and the lack of a complete picture regarding the number of wounded.[585] It is also noted that the Shayetet 13 soldiers on the takeover teams took part in treating and evacuating the wounded flotilla participants. Thus, for example, soldier no. 14 stated: "At the site for treatment of the wounded, I performed artificial respiration on one of the enemy who was wounded, and I put a tourniquet onto the leg of another who had a bullet wound in his leg."[586] Soldier no. 15 stated: "I performed artificial respiration on another two members of the ship's crew (the "activists") who were wounded, until the paramedic was available to treat them, and afterwards they were evacuated by helicopter. The doctor, the medics and the paramedics worked for hours and went from one to the next, treating them, inserting intravenous infusions, performing artificial respiration, and performing operations on all of the wounded who were on the roof, and then some of them were evacuated by helicopter to the hospitals. I even saw an incident in which one of the medics treated a

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584 See the doctor's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2.
585 *Id.*, at 2-3.
586 See testimony of soldier no. 14, *Id.*, at 3.

wounded and performed artificial respiration on him, and then when he became conscious again, he tried to get up and attack him."[587]

Apparently, already at this stage the handcuffs were removed from some of the flotilla participants who had been handcuffed during the takeover.[588]

It should be noted that those wounded who remained below deck also received medical treatment, some against their will. The Commander of the Takeover Force stated:

> "All of the people slowly exited the halls, other than the Knesset minister and a number of activists who were not willing to leave, and in addition to those not willing to leave were those wounded who didn't agree to be evacuated. At a certain point, I ask the activists inside the vessel whether there is any medical personnel inside, and I ask them to connect us. [...]
>
> After I asked the activists, their doctor approaches me, and I ask him about the condition of the wounded. He tells me that there are a considerable number of wounded who are not willing to be evacuated, some of whom are critically wounded and other activists are not letting them be evacuated. I take the decision that, despite the danger to my people aboard the vessel, I'm entering the halls to search for the weapons which had been taken from us and to evacuate the wounded from the vessel, despite their lack of desire to be evacuated, in order to save their lives. We enter the halls and begin searching, informing the activists that we're entering in order to evacuate the wounded. At this stage, we encounter resistance: the Knesset member and other activists block us with their bodies and try to prevent us from getting to the wounded. We move them aside using our hands, without hitting, just moving them aside, and we reach the wounded who are lying on the couches - we bring our doctor and start treating and evacuating the wounded. During the evacuation of the wounded, we conduct a search and look for weapons [...].[589]

587 See testimony of soldier no. 15, *Id.*, at 5; see also the testimony of soldier no. 13, *Id.*, at 5.

588 On this matter see for example testimony of soldier 21, at 3-4, and testimony of soldier no. 12, at 4-5, *Id.*

589 See testimony of the Commander of the Takeover force, *Id.*, at 6-7.

Evacuation of the Bodies

143. According to the soldiers' statements, the bodies were collected at a certain location on the roof,[590] covered,[591] transferred to the Morena speedboats, and then put aboard the navy's missile boat and transported separately to the port of Haifa.

> The Shayetet 13 commander stated about this:
>
> "We covered the dead in a respectful manner, on the side [...]
>
> We covered the dead and transferred them to the Morena speedboats in a concealed manner, in order to avoid causing unnecessary flak, and also out of respect for them. They were transferred from the Morena speedboats to the missile boat, which brought them to the base in Haifa."[592]

Taking Control of the Halls

144. While the wounded were being treated and the dead were being evacuated, the *Mavi Marmara* was boarded by the "Masada" unit of the Israel Prison Service (the "Masada" unit is the operational control unit of the Prison Service, deployed in prison facilities under the Prison Service's authority, and it is an operationally-ready force in its areas of specialization, which include handling serious violations of public order through the use of less-lethal weapons); also, a force from the special patrol unit of the Border Patrol, which included 51 male police officers and two female police officers, boarded the *Mavi Marmara*.[593] After the wounded had left the halls, the IDF soldiers ordered all of the flotilla participants to leave the halls. At this stage, the participants were checked in order to ensure that they did not possess any weapons. According to the soldiers' statements, the checks of the participants were done according to guidelines (i.e., searches of women's bodies were conducted only by female police officers),[594] and that "the searches were conducted

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590 See for example the doctor's testimony, *Id.*, at 2: "on the roof I found about 20 activists lying down, of them five killed and 15 injured, we gathered the wounded and the dead separately"; as well as testimony of soldier no. 13, *Id.*: "soldier no. 18 asked me to organize and separate the bodies of the terrorists from the wounded […] soldier no. 14 and I collected the bodies (about 5 bodies)".

591 See the Commander of the Takeover Force's testimony, *Id.*, at 7, according to which the bodies were covered in sleeping bags found on the ship.

592 See testimony of Shayetet 13 commander, *Id.*, at 6.

593 A reduced force from the Masada unit boarded the Marmara at about 05:10, after the fighting on board the Marmara was finished. The main force boarded the Marmara at about 05:38.

594 See for example the testimony of soldier no. 14, *Id.*, at 3.

with respect, without undressing the people and while protecting their dignity."[595]

The material in the Commission's possession indicates that some of the flotilla participants were handcuffed, mainly young men who the forces were concerned would try to attack them or to cause a disturbance. The Shayetet 13 commander stated that he had instructed the soldiers as follows: "The soldiers were instructed to handcuff people who were acting wild or constituting a danger or threat to the soldiers, and they were instructed that they should not handcuff women, children, or the elderly, and this is what was done."[596] Soldier no. 15 also stated: "None of the women or the older people on the ship's crew (both men and women) were handcuffed. Only the young men who could act wild or attack us."[597] Soldier no. 10 stated: "It is important to note that I did not see even one woman or any older / elderly man who was handcuffed. The only ones who were handcuffed were suspected terrorists who constituted a threat to the security of our forces."[598] Knives, slingshots and marbles were taken from some of the IHH activists who were handcuffed.[599] The commander of the takeover force stated that even after the wounded were removed, the physical resistance of some of the participants continued:

> "After all of the wounded were removed (about 10-15), I don't remember exactly, the resistance continued - physical, by some of the activists - including one of them struggling wildly, which required us to use force in order to stop him."[600]

It should be noted that in his testimony before the Commission on October 25, 2010, Muhammad Zidan, chairman of the Israeli Arab Monitoring Committee, stated that all of the flotilla participants were handcuffed.[601] However, Mahmoud Abu-Dabas, the head of the southern branch of the Islamic Movement, stated in his testimony on October 25,

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595 *Id*.

596 See testimony of Shayetet commander, *Id*., at 2.

597 See testimony of soldier no. 15, *Id*., at 5.

598 See testimony of soldier no. 10, *Id*., at 3; though the commander of the takeover force testified thus: "we concentrate them at points on the open deck, frisk their bodies - perform a search to make sure they are not carrying any weapons, with the women coming out being searched by female YASAM police officers, and we handcuff everyone", but later he states: "we did not handcuff all the women and elderly people". See the Commander of the Takeover Force's testimony, *Id*., at 6-7. For an additional description of the handcuffing of resistors on the roof for fear they would continue attacking IDF soldiers, see the testimony of soldier 24, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2.

599 On this matter see the testimony of soldier no. 11, at 2; Testimony of soldier no. 24, at 2, as well as Testimony of soldier no. 25, *Id*., at 3.

600 See testimony of the Commander of the Takeover Force, *Id*., at 6-7.

601 Transcript of session no. 15 "Testimony of Mr. Muhammed Zidan" (Oct. 25, 2010), at 11.

2010, that not all of the passengers were handcuffed, but rather "the decisive majority".[602] Additional evidence obtained by the Commission supports the conclusion that not all of the flotilla participants were handcuffed. For example, various video footage from aboard the *Mavi Marmara* after the takeover and before anchorage in the port of Ashdod clearly supports this conclusion.[603] Also, in the internal investigation conducted by the "Masada" unit following the takeover operation on the *Mavi Marmara*, it was noted that 195 passengers were under the supervision of members of this unit and were not handcuffed, and that only the "people with fighting potential" were handcuffed.[604]

145. During the aforesaid searches, knives and large sums of cash were found on some of the IHH activists. During these searches, magnetic media which was found was confiscated (the magnetic media included, *inter alia*, laptop computers, mobile phones, memory cards, hard discs, videos, diskettes, compact discs, movies, players, etc.; cameras were not taken, although their memory chips were).[605] During the searches, some of the equipment which had been taken from soldiers no. 1, no. 3 and no. 4 (the soldiers who were taken below deck) was found. Similarly, soldier no. 3's pistol was found hidden inside the halls, which as far as is known he had not managed to shoot before it was taken from him by the IHH activists; it was found with its magazine empty and the guard back (i.e. a weapon from which someone had shot all of its ammunition, without performing the operation after finishing the ammunition, which is standard IDF procedure).[606] Beyond this, no firearms were found on the *Mavi Marmara*, not even the weapons that had been taken from the two soldiers by the IHH activists. However, one soldier testified that he saw

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602 Transcript of session no. 15 "Testimony of Sheikh Hamad Abu-Dabas" (Oct. 25, 2010), at 33.

603 See for example video file "Salah_is_a_live.mov", on folder *13*, *Navy Data Disc*, *supra* note 5, taped after the takeover by the army forces, presenting several dozen men, some handcuffed and some not (the exact time of the video is unclear from the properties of the file submitted to the Commission, but it is clear that it was taped after the takeover and before the ship reached Ashdod's Port). See also video file "MOV023.mov", in folder *Memory Card*, in folder *Sea*, *Id.* (the video was shot on 31.5.2010 at 10:54, according to the file's properties).

604 See *Masada Unit inquiry* 11 (Oct. 5, 2010), the folder containing the inquiry was marked as exhibit 98 by the Commission. From the inquiry it arises that 314 passengers were handcuffed by Masada personnel, while the rest were handcuffed by IDF soldiers.

605 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. N, according to which some of the magnetic media gathered at this stage was transferred to Israel by helicopter to be used by the IDF spokesperson and advocacy department . The rest of the material was transferred to the Document and Technological Capture Collection unit upon the vessels' arrival at Ashdod Port.

606 See *Id.*, at para. K.

a firearm being thrown into the sea.[607] Various other combat equipment was found on the *Mavi Marmara*, which apparently had been brought on board by the flotilla participants, including flares, rods, axes, knives, tear gas, gas masks, marbles, screws, vests with the crescent symbol, night vision devices (including two types of devices that amplify starlight through both or only one eye), etc.[608] The commander of "center B" (the commander of the force that took control of the *Sfendonh Boat 8000* and the *Gazze*, and who afterwards boarded the *Mavi Marmara* in order to assist) stated that he saw Molotov cocktails which had been placed in orderly stacks.[609] In addition, scarves, and flags of the Hamas movement and its military wing were found.

After the searches and the handcuffing had been completed, the flotilla participants were brought back into the halls, where they sat until arrival in the port of Ashdod. According to the statements of the combat personnel, the participants were given water and food during this stage, and they were escorted to the bathrooms upon their requests.[610] Similarly, according to the statements of the soldiers, at this stage the handcuffs were removed from some of the participants who had been handcuffed earlier, and from the ship's crew as well, and regarding others, the plastic restraints were replaced and put on more loosely.[611] It should be noted that one of the passengers on the vessel held an infant. According to the soldiers' statements, they permitted her to go to her bag in order to take supplies for the baby and allowed her to walk freely around the ship.[612]

It should be noted that during the searches conducted on the *Mavi Marmara*, no humanitarian supplies were found.

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607 See testimony of soldier no. 33, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2-3.

608 See testimony of Team Commander R, *Id.*, at 2, as well as testimony of soldier no. 15, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 5-6.

609 See the testimony of Commander of Center B, *Id.*, at 2.

610 See for example the testimony of commander of the Takeover Force, *Id.*, at 6-7, as well as the testimony of Commander of Center A, *Id.*, at 2.

611 See testimony of soldier no. 10, *Id.*, at 3; as well as testimony of soldier no. 27, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2-3. See also Transcript of session no. 11 "Testimony of Foreigners & Enforcement Administration Head" (Oct. 12, 2010), at 10 [hereinafter *Testimony of Foreigners & Enforcement Administration Head*], according to which: "some were taken off the ship handcuffed, most were not handcuffed. Some, those who were the provocateurs in the full sense of the word, they were handcuffed." This testimony receives support from a videotaped at Ashdod Port and submitted to the Commission by the Prison Service, see Video CD *Flotilla arrestees Ashdod Port* (Oct. 5, 2010), the folder containing the investigation was marked by the Commission as exhibit 98 [hereinafter *Prison Service Video CD*].

612 In this context see the testimony of soldier no. 26, *Id.*, at 2-3; testimony of soldier no. 25, *Id.*, at 4, as well as the testimony of soldier no. 27, *Id.*

The Takeover of the Other Vessels

146. As stated above, five other vessels approached the coast of Israel on May 31, 2010, in addition to the *Mavi Marmara*: the boats *Boat Sfendonh 8000* (hereafter: ***Boat 8000***)[613] and *Challenger 1*, and the ships *Defene Y*, *Gazze*, and *Sofia*. The IDF took control of these vessels after they refused to heed warnings that were transmitted to them. No loss of lives occurred on these vessels; although the soldiers encountered violence during the takeover of some of them, it was at a much lower level than they encountered on the *Mavi Marmara.* With respect to some of the vessels, force was used in order to complete the takeover. The actions to take control of these vessels are described briefly below, in the chronological order of their being taken over.

Boat 8000

147. The takeover of this boat commenced at 4:27 a.m, which carried approximately 48 participants and crew members (most of them were Europeans, and there were four Americans, a Jordanian, a Moroccan, a Lebanese and two Iranians). Nineteen soldiers boarded the deck from two Morena speedboats, which simultaneously approached the sides of the boat, after paintballs were shot at those flotilla participants who were standing on the deck and throwing various objects at the soldiers, to cause them to flee from the deck. During the takeover, the force encountered violence, including an attempt to seize a weapon from a soldier, pushing and shoving soldiers from the stairs to the lower level, physical clashes at close ranges, and barricading themselves onto the ship's bridge. During the takeover, physical force was used against the violent activists. Paintball rifles were used (157 paintballs were shot during the takeover; some of the paintball rifles were broken during the takeover operation); 4 flash bang grenades were thrown (a type of stun grenade that creates noise and temporary blindness, which is used for dispersing demonstrations and controlling disorderly conduct) and Tasers were used.[614] No live ammunition weapons were used during the takeover. During the takeover, four passengers were injured from hand-to-hand combat blows. These passengers refused to accept Israeli medical treatment, and they were treated by the ship's doctor while they were not

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613 In the ship's documents only the name SFENDONH appears. In IDF documents it is named "Boat 8000". In order to prevent confusion this ship will be called by the name given to it in IDF documents. See *Boat 8000-Sfendonh Information Documents* located on the ship by the IDF and transferred to the Commission; marked by the Commission as exhibit 91.

614 See Navy Inquiry, marked by the Commission as folder 90.

handcuffed. Out of the flotilla participants who were on the deck of this boat, about five of the passengers were handcuffed at the time the bridge was taken over, and about three additional passengers were handcuffed at a later stage because they "tried to incite everyone [...] and they began calling out to rise up and resist, including passages in Arabic from the Koran."[615] According to the statement of the commander of center B, the senior commander of the force designated to take control of this boat, the handcuffing was done while the participants were sitting on plastic chairs, some of them were released during the journey to the port of Ashdod, and, with respect to others, the pressure of the plastic restraints was loosened after they complained about them.[616]

It should be noted that soldier no. 19 stated that, during the stage of the fast-roping from the helicopters onto the *Mavi Marmara*, this boat maneuvered in such a way that almost brought it onto a collision course with, and it also chased after, the command vessel (the *Zaharon*) for Center A (the force designated to take control of the *Mavi Marmara*). According to him, the boat reached a distance of less than twenty meters from the command vessel and, finally, after a sharp evasive maneuver, the command vessel managed to escape.[617]

No humanitarian supplies were found on this boat.[618]

Challenger 1

148. The takeover of the *Challenger 1* commenced at 4:56 a.m. There were 17 crew members and passengers aboard (including six who held American passports, two who held British passports and one who held an Israeli passport). Prior to the takeover, the boat performed an evasive maneuver and the force had to conduct a pursuit in order to reach it. The Takeover Force Commander (the commander of the force which had been designated to take over the *Mavi Marmara*) further stated that the boat tried to run into the Morena speedboat carrying his force, and the Morena had to perform a maneuver to escape.[619] After the force reached the boat,

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615 See testimony of the Commander of Center B, *IDF Completion Response of 7.11.2010*, *supra* note 486.

616 *Id*.

617 See testimony of soldier no. 19, *Id*., at 1-2.

618 See the testimony of commander of Center B, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2. See also *Civilian Policy Regarding Gaza Strip - Part B*, *supra* note 57, at appendix L.

619 See testimony of the commander of the takeover force, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1: "Near the challenger ship it attempts to run our vessel over, and through aggressive maneuvering we evade it". See also in the testimony of soldier no. 20, *Id*., at 1: "at this stage as I am moving fast towards the target I notice the Challenger sailing towards us quickly and trying to ram us. We performed an evasion from it and at the same time soldier no. 19 came up on the radio and told me to be careful since the challenger is

15 soldiers climbed aboard it from two Morena speedboats. On the deck of the boat, the soldiers encountered verbal violence and an attempt to push them. The dining hall was locked from the inside by the boat's passengers. During the takeover, approximately 15 paintballs were fired and Tasers were used against several flotilla participants.[620] The participants resisted receiving medical treatment and some were handcuffed by IDF soldiers.

No humanitarian supplies were found on the boat.[621]

Defene Y

149. At 5:15 a.m., the takeover of this ship commenced. There were 21 passengers and crew members on board, all of whom were Turkish. Fourteen soldiers fast-roped onto the deck of the ship from a helicopter and took control, without any violent incidents being reported, other than verbal violence. It should be noted that the ship's cranes were placed in such a way that they interfered with the fast-roping from the helicopter, which required fast-roping from a greater height and a change in the fast-roping landing point (the fast-roping was conducted onto a location adjacent to the ship's bridge). It should also be noted that in the communications room that had been set up on the ship, the takeover force found movies which documented the crew members practicing the use of water hoses against a takeover. Also, cables had been strung out, and stones and metal rods had been placed along the sides of the ship. The ship's passengers were not handcuffed after the takeover.

The force commander stated:

> "My general sense from the inquiry of the people and from the preparations aboard the ship was that the ship was prepared for a physical confrontation and provocation, and chose during our takeover not to do so, because they heard in real time (from the sailor) that there were wounded aboard the *Mavi Marmara* and so they were afraid."[622]

Humanitarian supplies were found on this ship (wheelchairs, medical equipment, sanitary items, cartons of clothing, toys, beds, carpets, blankets, etc.), as well as construction supplies (raw materials for

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headed for me. I approve the report and increase speed and manage to evade the target and approach the Marmara […]".

620 See Navy Inquiry, *Execution Description Center C*, marked by the Commission as folder 90.

621 See *Civilian Policy Regarding Gaza Strip - Part B, supra* note 57, at appendix L.

622 See the testimony of commander of the Takeover Force, *Inquiry Expansion of 20.9.2010, supra* note 451, at 2.

buildings, construction materials for structures, sheet metal, etc.).[623] For a complete list of the supplies which were on this ship, see annex "E".

Gazze

150. At 5:45 a.m., the takeover of this ship commenced. There were 18 passengers aboard, all of whom were Turkish citizens. Nineteen soldiers boarded the ship from two Morena speedboats which approached the sides of the ship. The takeover of the ship did not involve violence.

The commander of center B stated:

> "The field commander instructed me to advance to taking control of the *Gazze*. I updated the force and we headed to the *Gazze*. The field commander came up opposite me, while we were moving, and he told me that they had all surrendered and were on the bridge with their hands up. I boarded the ship, which was not moving at the time. All the people were gathered on the bridge and we went up, there was no resistance. The captain gave me the passenger list. There was full cooperation. We did not see any weapons or combat items of any kind. On the boat, there were about 18 people, who were very frightened."[624]

The ship's cargo included 1,358 units of cement and 304 units of metal girders.[625]

Sofia

151. At 5:45 a.m., the takeover of this ship began. Aboard this ship were 31 passengers, of whom 28 held Greek passports and three were Swedes. Eighteen soldiers boarded the ship from two Morena speedboats which approached the sides of the ship. The soldiers did not encounter violence, although several participants did not cooperate and did not heed the soldiers' instructions. The soldiers ordered the passengers to accompany them, to descend from the ship's bridge, and to come to an assembly point designated on the roof in front of the bridge, underneath a shade netting. Several participants refused to cooperate, cursed and swore at the soldiers, and agitated and incited the rest of the passengers. These participants also grabbed onto the ship's railing and the metal fencing along the edges of the ship's bridge. Force was applied and a Taser was used in order to handcuff these participants. The material before the Commission also indicates that, during the attempt to move

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623 *The Civilian Policy Towards the Gaza Strip - Regarding the Claims of Human Rights Organizations of 31.10.2010*, *supra* note 217, at 30-31.

624 See the testimony of commander of Center B, *Inquiry Expansion of 20.9.2010*, *supra* note 451.

625 See *Civilian Policy Regarding Gaza Strip - Part B*, *supra* note 57, at appendix L.

these participants to the assembly point, five paintballs were fired at the lower parts of their bodies.[626] This matter is discussed below.

Humanitarian supplies were found aboard this ship (electric wheelchairs, medical supplies, cartons of clothing, toys, water tanks, etc.). For a complete list of the supplies found aboard this ship, see annex "E".

Treatment of the Flotilla Participants from their Arrival in the Ashdod Port until their Deportation from Israel

152. The vessels in the flotilla began entering the port of Ashdod at 11:00 a.m. on May 31, 2010. The *Mavi Marmara* was tied up in pier no. 1 in the port of Ashdod on May 31, 2010, at 5:19 p.m.[627] Upon its arrival at the Ashdod port, "the baton was handed over" (authority was transferred) from the IDF forces to the Special Central Unit force (hereafter: **Yamam**), (the counter-terrorism unit of the Israeli Border Police), which took authority for control over handling the ships. Afterwards, the process of debarking the flotilla participants from the ships commenced. On the ships' gangways, another "baton handover" took place between the members of Yamam and the escort force composed of both a police officer and an IDF officer or a non-Commissioned officer. It should be noted that the flotilla participants were instructed to leave their personal belongings on the vessels. The IDF forces guarded the personal belongings, and after they were examined by the bomb-squad unit, they were collected by the IDF, with each bag being fastened with a security closure ("sealed with an individual number") and documented. The personal effects were searched by the military police and collected in separate containers, in accordance with the vessel on which the participants had journeyed.[628] It is noted that after the event, several investigations were conducted (some of which led to indictments) concerning thefts perpetrated by some IDF soldiers during the stage when they were in charge of guarding the personal belongings of the participants. This matter will be addressed below (see below, para. 160).

According to the investigation of the Prison Service, processing the arrival of the flotilla participants on land commenced at 1:00 p.m.[629] Four

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626 See the testimony of soldier no. 18, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 4; See also summary, *Id.*, at 10.

627 The *CHALLENGER 1* ship entered Ashdod Port at 11:00; *Boat 8000* entered Ashdod Port at 12:00; the *DEFENE Y* ship entered Ashdod Port at 15:19; the *GAZZE* ship entered Ashdod Port at 15:30; The *SOFIA* ship entered Ashdod Port at 16:25.

628 *IDF completion response of 15.11.2010*, *supra* note 400, at para. N.

629 *Operation "Winds of Heaven 7"*, 14 (investigative report by the Prison Service Commander, Oct. 5, 2010) marked by the Commission as exhibit 98 [hereinafter *Prison Service Investigative*

tents were set up in the Ashdod port: (i) the first was used for a security check of the flotilla participants who were taken off the vessels; (ii) the second was used for conducting hearings by the border patrol supervisor on behalf of the Population and Immigration Authority of the Ministry of the Interior, pursuant to the Entry into Israel Law, 5712-1952 (hereafter: **Entry into Israel Law**);[630] (iii) the third was used for conducting medical examinations; and (iv) the fourth was used to prepare the participants to be taken from the port of Ashdod to prison facilities or to Ben-Gurion airport.[631] It should be noted that the entire facility was a closed facility under the control of the IDF, that restrooms had been set up in advance, and that while in this facility, the participants were given drinking water and a something to eat.[632]

As the participants debarked from the vessels in the port of Ashdod, each one was searched with a metal detector (similar to the manner in which these searches are conducted in airports throughout the world). At first, the search was conducted by means of a magnetometric gate. At a certain stage, the magnetometric gate broke down and, therefore, searches were conducted with a hand-held metal detector by members of the "Nachshon" unit of the Prison Service.[633] In general, physical searches were not performed on the participants, other than instances in which the metal detector emitted an alert about the presence of suspicious metals. In the event that a physical search was required (which was required in about 20% of the searches, according to the Nachshon unit), the participant being searched was brought to a private examination stall.[634] The material before the Commission indicates that a search of a male was conducted only by a male and the search of a female was conducted only by a female.[635] It should be noted that during the search of one of the flotilla

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Report].

630 See fourth chapter of the law, which deals with expulsion and custody. It is particularly stated in para. 13(a) of Israel's Entry Law 5712-1952 that "anyone who is not an Israeli citizen or an immigrant according to the Law of Return, 5710-1950 and found in Israel without a Permit of Residence (under this law - an unlawful resident), would be expelled from Israel as soon as possible unless he has previously departed of his own accord".

631 See *Testimony of Foreigners & Enforcement Administration Head*, *supra* note 611, at 2.

632 *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 35.

633 On this matter see *Gaza Flotilla - Reference* (summation of events by Brigadier Yossi Mikdash, commander of the Nachshon Prison Service unit, Oct. 17, 2010), marked by the Commission as exhibit 130 [hereinafter *Nachshon Prison Service Unit Commander's Reference*].

634 Letter from Brigadier Yossi Mikdash, commander of the Nachshon Prison Service unit to the Assistant Commissioner titled *Gaza Flotilla - Reference,* reference no. 58740610, (Oct. 17, 2010), at para. 1, marked by the Commission as exhibit 130.

635 See *Testimony of Foreigners & Enforcement Administration Head*, *supra* note 611, at 10-11; See also *Nachshon Prison Service Unit Commander's Reference*, *supra* note 633.

participants, an alert was emitted by the hand-held metal detector when the instrument passed near her groin area.[636] The material which was transferred to the Commission from the Ashdod port security indicates that the participant wore overalls and that, in the aforesaid area, no metal was visible (zipper, buttons, etc.). The person conducting the search consulted with her supervisors about this matter, and it was decided to perform an additional search without the overalls. The participant was requested to enter the private examination stall, to which the entry of men was prohibited, and to roll the overalls down to her knees. The security of the port of Ashdod reported that the participant remained dressed in her shirt and her underwear. The person conducting the search performed the additional search with the assistance of a hand-held metal detector. When she received another alert, she asked the flotilla participant what she was concealing, and the participant withdrew her mobile phone. The mobile phone was transferred to the IDF representative on site; the participant was released for the rest of the handling by the other authorities in the absorption process.

Escorting and guarding of the detainees was conducted by the Nachshon unit (which is experienced in escorting and transporting detainees and prisoners), and members of the "Oz" unit of the Population and Immigration Authority of the Ministry of the Interior.[637]

After the security check, the flotilla participants were directed towards one of the 14 stations set up by the Border Control supervisor of the Population and Immigration Authority. When they were brought to the hearing before representatives of the Enforcement and Foreigners Department, those flotilla participants who were handcuffed were released from their handcuffs. At these stations, the participants were identified, their faces were photographed, and a hearing was conducted, with the assistance of interpreters.[638] According to the testimony of the director of the Enforcement and Foreigners Department, Mr. Yossi Edelstein, at this stage some of the flotilla participants engaged in passive resistance, but force was not used.[639]

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636 See letter from the Ashdod Port Director General's office to the Public Commission to Examine the Maritime Incident of May 31, 2010 (Dec. 21, 2010).

637 Transcript of session no. 15 "Testimony of Prison Service Commander" (Oct. 12, 2010), at 9-12 [hereinafter *Testimony of Prison Service Commander*].

638 See *Testimony of Foreigners & Enforcement Administration Head*, *supra* note 611, at 2, according to which there were about 40 translators in the area, including 26 speakers of Turkish, 8 speakers of Arabic, 4 speakers of French, one speaker of German, 3 speakers of Spanish, as well as many English and Russian language translators, and so on.

639 *Id.*, at 3; in this context it should be mentioned that Israel's Entry Law 5712-1952 does not require the unlawful resident's agreement for his expulsion from the State of Israel.

At the conclusion of the process, detention orders were issued (including a copy in the language of each detainee), authorizing the incarceration of each detainee until their deportation from the territory of the State of Israel. The arrest warrants give the detainee the right to remain imprisoned within the territory of the State of Israel for 72 hours, so that s/he can exercise the right to appeal the Ministry of the Interior's decision to deport him or her from the State of Israel before a detention court.[640] After the completion of this process, the flotilla participants were brought to the medical tent, which also had 14 stations (in enclosed stalls). At these stations, the participants were asked about their medical condition (with the assistance of interpreters), and they were examined by a physician or a medic. Afterwards, the flotilla participants were taken to the last tent, where biometric measures were taken (fingerprinting and photographing).[641] It should be noted that the investigation of the Prison Service indicates that this station was cancelled by the deputy commander of the Nachshon unit in the early stages of the absorption process due to the great overload which developed at this station. It was decided that the biometric measures would be taken in the prisons instead. However, the process was not completed at the prisons either, due to "overload and the absorption process in the wings."[642]

It should be noted that a movie delivered to the Commission by the Prison Services indicates that some of the flotilla participants refused to move through the various tents, and that members of the "Nachshon" unit had to drag them physically from place to place. It should also be noted that in the briefing which the commander of the "Nachshon" unit, Brigadier Yossi Mikdash, held on May 31, 2010, for members of the unit before the debarking of the flotilla participants from the vessels, it was explained that the flotilla participants should not be handcuffed, other than in exceptional circumstances and with prior approval.[643] It was decided that the official who could give approval in this context would be the deputy Commissioner of the Prison Services, except in the event that a spontaneous extraordinary event developed which required handcuffing even without the aforesaid approval.[644] During the absorption phases at the port of Ashdod, three flotilla participants attempted to attack personnel, and at the directive of the commander of the "Nachshon" unit, they were bound, with the use of force.[645]

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640 See para. 13(d) of Israel's Entry Law 5712-1952.
641 See *Prison Service Investigative Report*, *supra* note 629, at 22.
642 *Id*.
643 See *Prison Service Video CD*, *supra* note 611, where the briefing is videotaped.
644 *Testimony of Prison Service Commander*, *supra* note 637, at 16.
645 See *Prison Service Investigative Report*, *supra* note 629, at 15.

153. The process of receiving the participants at the port in Ashdod concluded on June 1, 2010, at 9:45 a.m.[646] Forty-five flotilla participants requested immediate deportation from the territory of the State of Israel, and thus they were escorted directly from the Ashdod port to Ben-Gurion airport by the Nachshon unit of the Prison Service.[647] The remainder of the flotilla participants were transported[648] to facilities of the Prison Service, distributed as follows: 604 of the detainees were transported to the "Ella" prison; eight of the detainees were transported to the "Givon" prison; 19 of the detainees were transported to the Prison Service's medical center for medical treatment; seven of the detainees, citizens of the State of Israel, were transferred to the authority of the Israeli police for interrogation and detention; and, after the interrogation, three of these seven were brought to the "Shikma" prison.[649] According to the Prison Service's investigation, the flotilla participants were not bound during escort to the prisons (other than three of the participants who were unruly at the port of Ashdod and were transported to the "Ella" prison)[650] and the men and women were transported separately.[651]

The material before the Commission indicates that the flotilla participants were imprisoned in open wings (other than during four daily counts),[652] they were permitted to meet with attorneys and with the consuls of the countries of their citizenship (19 attorneys and 45 consuls entered the prisons),[653] and they were given food, personal effects, track suits,

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646 *Id.*, at 6.

647 See *Id.*, at 45-46; It should be mentioned that these forty five participants were asked to sign a form according to which they waive their right to appeal the decision to remove them from the State of Israel.

648 All prisoners were transported in air-conditioned busses; according to the existing procedures in Israel, a bus that is not air-conditioned is unsuitable for use when transferring prisoners; see *Testimony of Prison Service Commander*, *supra* note 637, at 12-13.

649 Id., at 3-5.

650 See *Prison Service Investigative Report*, *supra* note 629, at 23.

651 *Id.*

652 *Id.*, at 27.

653 *Id.*, at 26; It should be mentioned that after the event claims were made that the participants of the flotilla were deliberately kept from meeting with their lawyers. The material before the Commission (which includes, among other things, materials relating to the preparations made towards the reception of the flotilla participants, the Prison Service inquiry which was conducted afterwards), indicates that there was no deliberate intention to prevent the flotilla participants from meeting with lawyers. At the same time, there were certainly more than a few difficulties in this context derived from the short period of the flotilla participants' stay in Israel, the large number of participants, and the fact that they were held in open cells and the "Ella" prison staff had difficulty locating them when they were asked to attend various meetings. In this context see the Supreme Court's verdict in HCJ 4169/10, 4193/10, 4220/10, 4221/10, 4240/10, 4243/10 *Cohen v. Defense Minister* (still unpublished, Jun. 2, 2010), at para. 6 [hereinafter *Cohen* matter]; See also *Testimony of Prison Service Commander*, *supra* note 637, at 22-23.

and undergarments.[654] Also, most of the participants met with a social worker upon their arrival at the prison (special instructions were given regarding one flotilla participant who was identified as being in a state of emotional distress).[655] Apparently, during the detention phase, force was used during only one incident: while one of the flotilla participants was in the "Ella" prison, she blocked the path of the team commander from the "Nachshon" unit, and she refused to move from the location. With the approval of the deputy commander of the "Nachshon" unit, the flotilla participant was physically moved. In response, the detainee pushed the team commander, scratched her on the face, and tore her shirt. During the incident, force was used in order to control the participant.[656]

154. Pursuant to the directive of the Attorney General on May 31, 2010, the Israeli police opened an investigation against the flotilla participants, on suspicion of attacking IDF soldiers who took control of the *Mavi Marmara*, and other offenses. On June 1, 2010, the United Nations Security Council approved a presidential statement denouncing Israel's actions and called for the release of the vessels and the detainees, as well as the transfer of the corpses to Turkey.[657] On the same day, the Ministerial Committee for National Security Matters met and recommended, for diplomatic reasons, to release all of the flotilla participants and not to pursue the legal proceedings against them.[658] After he undertook consultations on this matter, the Attorney General adopted this position, and on June 2, 2010, he issued a written order permitting the immediate deportation from Israel of "the foreigners who arrived on the flotilla who are suspected of committing criminal offenses", on the grounds which he set forth.[659] Three petitions which were submitted to the Supreme Court against the decision of the Attorney General were rejected.[660] Therefore, the flotilla participants were transferred from the prison facilities to Ben-

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654 See *Prison Service Investigative Report*, *supra* note 629, at 27.

655 *Id.*, at 26.

656 *Id.*, at 23-24.

657 See *The Gaza Flotilla - response update 4* (compilation by Foreign Ministry, Center for Political Research, 1.6.2010), at 1, 4-5; marked by the Commission as exhibit 59.

658 Decision B/39 by the Ministers' Committee on Matters of National Security *Israel's Policy Regarding the Gaza Strip (Military and Civilian)* (Sep. 19, 2007) [hereinafter *Ministers' Committee on Matters of National Security Decision of 1.6.2010*], the folder containing the exhibit was marked by the Commission as folder 4.

659 See decision of Government Attorney General (Jun. 2, 2010).

660 See the *Cohen* matter, *supra* note 653; in the verdict the three petitions (HCJ 4221/10 submitted by Yekutiel Ben Yaakov, HCJ case 4240/10 submitted by the *Shurat Hadin* Organization, and HCJ case 4243/10 submitted by the *Almagor* organization for Victims of Terrorism) who asked to prevent the release of the foreign participants of the flotilla were rejected after the Supreme Court determined that the decision to release them was well within the bounds of the Attorney General's discretion.

Gurion airport, from where they were flown to the countries from which they had departed on the flotilla. Therefore, the duration of the flotilla participants' stay in the prison facilities of the Prison Service did not exceed forty-eight hours.[661]

It should be noted that after the flotilla participants were transferred to Ben-Gurion airport, about 40 flotilla participants who had met with Turkish diplomatic representatives at Ben-Gurion airport began to clash with police forces in the passenger hall of the airport. The confrontation was documented by several journalists who came to Ben-Gurion airport to document the deportation of the participants.[662] The material provided to the Commission indicates that, in order to control the outbreak, the Israeli police engaged approximately twenty police officers who used their hands and handcuffs.[663] The material further indicates that in one instance, a club was used against a disturbance defined by the Israeli police as an "exceptional disturbance". As a result of the event, six of those who were disorderly required medical treatment.[664]

The Deceased and the Wounded

155. *The deceased.* As stated, upon completion of the takeover operation of the *Mavi Marmara*, there were, regrettably, nine deceased flotilla participants. Their bodies were transferred to the Abu Kabir Forensic Institute for a pathological examination. However, on June 2, 2010, Turkey contacted the State of Israel and requested that Israel transfer the bodies to Turkey that day.[665] The next day, Turkey furnished a written request that the bodies held by Israel be transferred to Turkey without autopsies being performed on them.[666] Although several alternatives were considered, such as including Turkish pathologists during performance

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661 According to the Chief of Staff's testimony the last passenger left Israel on Jul. 6, 2010, see the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 29.

662 See *Prison Service Investigative Report*, *supra* note 629, at 24, 30; according to the investigation, the Prison Service was not involved in the event, but the riot delayed the pace of accompanying flotilla participants from the holding facilities to Ben Gurion Airport.

663 *Israel Police - Data Completion* (Dec. 14, 2010), at 1-2, found in folder marked by the Commission as exhibit 149.

664 *Israel Police - Data Completion* (Dec. 22, 2010), at 1, Id.

665 See letter from Rafael Barak, Foreign Ministry Deputy Director General, to Yossi Gal, Foreign Ministry Director General (Jun. 1, 2010), the folder containing the exhibit was marked by the Commission as folder 60; the letter details a phone request made by the Turkish Ambassador to Israel that the bodies be returned that same day.

666 Letter from Jülide Kayihan, deputy to the Turkish Ambassador to Israel, to Rafahel Barak, Foreign Ministry Deputy Director General (Jun. 2, 2010), the folder containing the exhibit was marked by the Commission as folder 60.

of the autopsy, it was ultimately decided to transfer the bodies to Turkey after performing only an external examination.[667] This is the place to note that the Commission is unable to identify the deceased by their names.

The findings of the external examinations are as follows:[668]

Body no. 1: Bullet wounds: two in the abdomen-chest on the left side, one tangential wound on the left side of the abdomen, on the back from the right, on the right elbow, in the right arm, on the left hand, two on the left thigh. Superficial lacerations on the face, abrasions and scratches.

Body no. 2: Bullet wounds: on the right side of the head, on the right side of the back of the neck, on the right cheek, underneath the chin, on the right side of the back, on the left thigh. A bullet was palpated on the left side of the chest. Abrasion on the right arm.

Body no. 3: Bullet wound on the right side of the back of the neck, two bullet wounds on the right side of the back of the neck, a bullet wound on the right side of the abdomen, a bullet wound on the right side of the lower back, a bullet wound on the left back-buttock.

Body no. 4: Bullet wounds: on the left breast, the left buttock, the right shoulder, the right thigh, the right calf, two in the left thigh. Subcutaneous bleeding on the right side of the forehead. Lacerations on the forehead. Various additional abrasions.

Body no. 5: Two bullet wounds in the left shoulder, bullet wound in the right side of the chest, bullet wound in the right shoulder, bullet wound in the right thigh.

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667 See folder 74 of the Commission's exhibits. The State of Israel has asked to clarify whether the authorities in Turkey wished that a pathologist on their behalf would accompany the process in Israel, on this matter see letter from Rafael Barak, Foreign Ministry Deputy Director General, to Ahmet Oguz Celikkol, the Turkish Ambassador to Israel (Jun.2, 2010); in response to Israel's request, turkey stated that due to time constraints it would not be able to send a pathologist as stated, see letter from Jülide Kayihan, deputy to the Turkish Ambassador to Israel, to Rafael Barak, Foreign Ministry Deputy Director General (Jun. 2, 2010), the folder containing the exhibit was marked by the Commission as folder 60.

668 See *Pathological Report* (opinion by the National Center for Forensic Pathology, Jun. 1, 2010), the folder containing the exhibit was marked by the Commission as folder 74.

Body no. 6: Bullet wounds in the forehead and the back of the neck. Abrasion wounds on the right side of the forehead, the nose, the right knee.

Body no. 7: Bullet wounds on the left side of the chest, subcutaneous bleeding on the back, the left calf, and right elbow joint.

Body no. 8: Bullet wounds on the front of the right ear, bullet palpated under the skin of the torso on the left side, two bullet wounds on the right side of the back, bullet wound on the right buttock, various abrasions.

Body no. 9: Bullet wounds in the area of the right temple/ back of neck, bullet wound in the left nipple, bullet wound in the area of the scalp-forehead on the left side, bullet wound on the face (nose), bullet wound on the left torso, bullet wound on the right side of the back, two bullet wounds in the left thigh, two bullet wounds as a result of the bullet passing through toes four and five on the left foot.

156. *The Wounded Flotilla Participants.* As stated above, approximately 55 wounded flotilla participants were brought to hospitals in Israel. Ten of the wounded were treated at the Chaim Sheba Medical Center at Tel Hashomer, six of the wounded were treated at Rambam Hospital, 14 of the wounded were treated at Beilinson Hospital, four of the wounded were treated at Hadassah Ein Kerem Hospital, and 21 of the wounded were treated at Barzilai Hospital.[669]

157. *The Wounded IDF Soldiers.* As stated above, nine IDF soldiers were wounded during the takeover of the *Mavi Marmara*. At the Chaim Sheba Medical Center at Tel Hashomer, four soldiers were treated (soldier no. 2, soldier no. 4, soldier no. 5, and soldier no. 7), two of whom had bullet wounds. Soldier no. 2, who had a bullet wound in his abdomen, required two operations. Soldier no. 4 underwent an operation on his head. Soldier no. 5, who had a bullet wound in his left knee, and had been severely beaten on his head and abdomen, was hospitalized for treatment. At Rambam Hospital, three soldiers were treated (soldier no. 1, soldier no. 6,

669 31 wounded were evacuated by plane with Unit 669, 24 wounded were evacuated via the port of Ashdod, see *The Eiland Report*, *supra* note 402, at 146. The materials received from the various hospitals involved are found in the binder marked as Binder 147 by the Commission.

and soldier no. 3). Soldier no. 3, who had been stabbed in the abdomen, underwent surgery. Soldier no. 1 and soldier no. 6 were hospitalized for treatment in the hospital. Two IDF soldiers (soldier no. 9, soldier no. 11) were treated at Ichilov Hospital.

Post-incident events

158. All of the vessels other than the *Challenger 1* (which left the pier where it was anchored in the port of Ashdod on July 13, 2010, and is currently anchored in the naval base marina in Ashdod) left the Ashdod port and are anchored in the port in Haifa.[670]

With respect to the cargo that was on board the vessels, it was agreed between the Coordinator of Government Activities in the Territories (hereafter: **COGAT**) and the UN Secretary General's envoy to the Middle East, Mr. Robert Serry, in accordance with COGAT's guidelines on these matters, that the humanitarian supplies and construction materials found on board the vessels would be transferred to the UN for use by its agencies in the Gaza Strip. The material furnished to the Commission indicates that, within the UN, it was agreed to divide the supplies between the various agencies in the following manner: (a) the construction materials - 70% would be transferred to the United Nations Relief and Works Agency (UNRWA) and 30% would be transferred to the United Nations Development Programme (UNDP); (b) the other supplies would be divided among UNRWA (which has received the supplies and materials for the benefit of the population under its care), the WHO (the World Health Organization of the UN, which has received the medical and medical-related supplies, including medicines, wheelchairs, etc.), and UNICEF (the United Nation's Children's Fund, which has received supplies and materials to distribute to children, including clothing, toys and backpacks). As of December 26, 2010, 114 trucks carrying humanitarian supplies from the flotilla's vessels that are the subject of this report had entered the Gaza Strip, in coordination with the UN agencies, from among a total of approximately 200 trucks.[671]

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670 The *Mavi Marmara* left Ashdod Port on 6.6.2010; the Defney and Boat 8000 left Ashdod Port on 11.6.2010; the Sofia left Ashdod Port on 6.11.2010; the Gazze left Ashdod Port on 17.6.2010; see Flotilla to Gaza of 31/5/2010 (detail completion from The Ashdod Port Company LTD, 25.11.2010), found in folder marked by the Commission as exhibit 149.

671 See *Civilian Policy Regarding Gaza Strip - Part A, supra* note 52, at 30; see also Appendix C of *Civilian Policy Regarding Gaza Strip - Part B, supra* note 58; in general 35 trucks of concrete and eight trucks of building iron were brought in for seven UNRWA projects, as well as 71 trucks carrying an assortment of equipment (motorized carts, batteries, medical equipment and medicine, two water desalinization containers, generators, beds, and more). Goods not yet transferred and awaiting coordination with the UN include: (1)

159. The personal belongings of the flotilla participants were flown back to Turkey with the flotilla participants (after having been brought by naval officers to the "Ella" prison in Beer Sheva, where the prison staff refused to receive it because the flotilla participants were in the process of being transferred to Ben-Gurion airport).[672] Pursuant to instructions of the Ministry of Defense, 105 suitcases, which were returned by Turkey after they were not claimed, are being stored at the navy's supply base.[673] The magnetic media and the combat items found on the vessels were retained in Israel for further investigation.[674] It should be noted that, during the searches of the vessels after the event, additional personal belongings were discovered (wallets and documents), which were collected in six bags. These items were transferred to the representative of the Turkish embassy in Israel.[675]

It should be noted that in the prison cells in which the flotilla participants were held in the "Ella" prison, sums of cash were found in the amount of €3,500 and $4,000. These sums are currently being held in the safe of the legal department of the Prison Service (the Commission has been informed that the Prison Service contacted the Foreign Ministry about this matter, but has not received any instructions regarding the handling of these sums).[676]

On September 15, 2010, the photography equipment which was collected in this event was transferred to a representative of the journalists, Mr. Danny Zaken, the chairman of the Journalists Association in Israel.[677]

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raw materials for UNDP projects and for two UNRWA projects; (2) three X-ray machines which the UN refuses to bring into the strip claiming there is no need for used equipment without warranty; (3) transportable structures (caravans) and the materials to construct them - as of Dec. 26, 2010 the UN has not been able to receive instructions on how to construct the transportable structures. This issue should be resolved by the UN in the next few weeks.

672 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. N.

673 *Id.*; for a list of the equipment stored at the naval base see also appendix E, *Id*.

674 See *Complementary Information Regarding the Magnetic Media Captured During Operation "Winds of Heaven 7"* (Dec. 23, 2010), marked by the Commission as exhibit 158.

675 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. N; see also the document signed by the Turkish representative approving the reception of the equipment, appendix D, *Id*.

676 See "The Turkish Flotilla - Cash Currency Found in the Prison Service's Possession (Prison Service Data Completion, Nov. 16, 2010), found in folder marked by the Commission as exhibit 149.

677 During the handing over of the equipment there was an exhibition of the equipment and there was also a repeated examination and physical count and comparison to the catalogues prepared; see letter from Logistical Operations and Assets Branch to the Public Commission to Examine the Maritime Incident of May 31, 2010 (Sep. 19, 2010), found in folder marked by the Commission as exhibit 165.

160. As stated, after the event, the Military Police Investigations initiated seven criminal investigations against 16 suspects for various incidents of theft of property belonging to the flotilla participants by IDF soldiers who had contact with the aforesaid property.[678] At the time of writing this report, three of the investigations have led to indictments against four defendants and the conducting of criminal trials (the proceedings in one have even concluded). The details of these investigations are as follows:

a. Military Police Criminal Investigation Division, central region, file no. 67/10 - This case concerns the theft of a new laptop computer, two camera lenses and a compass which were seized on the *Mavi Marmara*, and entering into a conspiracy to commit the offenses of theft of the equipment which was seized on the *Mavi Marmara*. The investigation led to an indictment which was submitted in the military court against a recruits squad commander with the rank of corporal, who boarded the *Mavi Marmara* after it was anchored in the port of Ashdod and conducted searches aboard it. The defendant was charged with theft by a public servant, pursuant to Section 390 of the Penal Law, 5737-1977, and conspiracy to commit a crime, pursuant to Section 499(a)(1) of the foregoing law (file no. 430/10). After the indictment was submitted and as part of the plea bargain, the conspiracy charge was dismissed. On October 18, 2010, 2010, the military court sentenced the accused to the following: five months in prison (less the 39 days during which the defendant had already been imprisoned); a five months suspended sentence for three years; the maximum fine possible pursuant to Section 29 of the Military Justice Law, 5715-1955 (a sum of NIS 700 or three days imprisonment in exchange); demotion to the rank of private.[679]

b. Military Police Criminal Investigation Division, central region, file no. 64/10 and Special Investigations, northern region, file no. 10/03 - This case concerns the theft of four laptop computers with a total estimated market value of approximately NIS 10,000, and their sale to another IDF soldier in consideration of a total sum of NIS 4,800. The investigation led to an indictment which

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678 See *IDF Response for Completion Request* (Dec. 7, 2010), the folder containing the exhibit was marked by the Commission as folder 148 [hereinafter *IDF Completion Response of 7.12.2010*]; *IDF Response for Completion Request* (Dec. 15, 2010), the folder containing the exhibit was marked by the Commission as folder 154 [hereinafter *IDF Completion Response of 15.12.2010*].

679 Indictment and military court protocol in case GOC (district) 430/10, *IDF completion response of 15.11.2010*, *supra* note 400.

was submitted to the military court against the recruits platoon commander with the rank of second lieutenant, and a sergeant in the recruits platoon, who boarded the *Mavi Marmara* after it was anchored in the port of Ashdod and conducted searches on it. The two defendants were charged with the offense of theft by a public servant, pursuant to Section 390 of the Penal Law, 5737-1977, and unbecoming behavior pursuant to Section 130 of the Military Justice Law, 5715-1955.

c. Military Police Criminal Investigation Division, central region, file no. 66/10 - This case concerns the theft of a laptop computer and computer game console and conspiring to steal laptop computers which were seized from the passengers of the *Mavi Marmara*. The investigation led to an indictment which was submitted in the military court against a recruits squad commander with the rank of corporal, who boarded the *Mavi Marmara* after it was anchored in the port of Ashdod and conducted searches on it. The defendant was charged with the offense of theft by a public servant, pursuant to Section 390 of the Penal Law, 5737-1977, and conspiracy to commit a crime, pursuant to Section 499(a)(1) of the foregoing law.

d. Military Police Investigation, central region, file nos. 63/10, 65/10, 68/10 and Special Investigations, northern region, file no. 3/10 - These cases concern the suspected offenses of theft by a public servant and the possession of stolen property by seven soldiers, the offenses of buying stolen property, and the possession of stolen property by five additional soldiers (a total of 12 soldiers). These cases concern the suspected thefts of portable computers, which were on the *Mavi Marmara*, by several soldiers who boarded the vessel and searched it after the takeover was completed, and their sale to other soldiers. The criminal investigation of these cases has concluded and the files were transferred for review and decision by the military prosecutor. The decision of the military prosecutor about these cases is pending.

In addition to the foregoing, on December 15, 2010, the IDF informed the Commission that the military prosecutor has instructed the Military Police Investigations to initiate another investigation, concerning the suspected illegal use of the credit card of an Italian citizen who was on board the *Mavi Marmara*. A complaint was transmitted to the IDF by the Italian ambassador to Israel on behalf of the Italian citizen, whose wallet was confiscated from him after the takeover of the vessel was

completed. Upon the complainant's return to his country, he claims to have discovered that unauthorized use had been made of his credit card, which had been in his wallet when it was confiscated.[680]

The Flotilla Participants and Their Activities: Additional Details

161. The Commission was also requested to examine "the activities which were undertaken by the flotilla organizers and its participants, and their identity," pursuant to section 4.c of the Government's decision on June 14, 2010. These subjects are indeed integrally related to the matters which have been described above and which will be analyzed below. Nevertheless, the Commission find it appropriate to include additional details at this point in the report. As will be apparent, this information concerning the identity of the flotilla's participants and its organizers and the actions they undertook became known only after the events had taken place and after completion of the military operation. First, we will provide details about the identity of the flotilla's organizers. We will then discuss certain details concerning the identity of the flotilla's participants. Finally, we will describe the advance preparations undertaken by some of the flotilla participants in anticipation of the confrontation with IDF soldiers, as revealed by the documents and testimony obtained by the Commission.

The Organizers of the Flotilla

162. The flotilla itself was organized by a coalition comprised of a number of organizations, of which the leading organization was the IHH.[681] The IHH organization is, as stated, a humanitarian organization with a radical-Islamic orientation, which was established in 1992 and which was formally registered in Istanbul in 1995.[682] The organization is headed by Bülent Yildirim. The organization conducts a broad range

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680 See *IDF Completion Response of 15.12.2010, supra* note 678. In the margins, it should be mentioned that the Commission has, by coincidence, learned of a television news story regarding the suspected theft of equipment on the vessels participating in the flotilla by some of the Ashdod Port workers, but the Commission could not locate additional information in this context.

681 See *IHH Flotilla Campaign Summery*, *supra* note 209.

682 *IICC report* (May 27, 2010), supra note 83, at 1; some of these details, particularly the general details relating to the IHH organization and its activities, were known in advance of the flotilla incident, at the same time, concrete details regarding the scope of the IHH organization's involvement with the planning of the flotilla, as well as concrete details regarding the participants themselves, were only found out later.

of humanitarian activities, and, within this framework, it operates in distressed regions in the areas of food deliveries, assistance projects for orphans, establishing educational facilities, hospitals and medical clinics, programs for vocational education, supplying medicines, building mosques, and preventing human rights violations throughout the world.[683] The organization also operates in various European countries through its branches.[684] However, alongside its humanitarian activities, the IHH organization provides support to radical-Islamic and anti-Western terrorist organizations.[685] The organization also supports the Hamas and does not conceal the ties between the organizations.[686] The IICC report dated May 27, 2010, states, *inter alia*, that the IHH organization is a member of the "Union of Good" coalition, and provides assistance to the Hamas by organizing public support conferences in Turkey in which senior Hamas officials took part, by providing significant amounts of funding to Hamas institutions in the West Bank (including associations which have been banned in Israel) and operating widespread activities in the Gaza Strip.[687] The organization has even established a branch in the Gaza Strip, which is headed by Muhammad Kaya. In January 2008, during a meeting of the organization's delegation with Ahmed Bahar a senior Hamas activist who serves as the deputy speaker of the parliament of the Hamas government in the Gaza Strip, the organization presented the extent of the assistance it provides to the Gaza Strip, and also announced that it would double this support in the future. In January 2009, the head of the IHH organization, Bülent Yildirim, met with Khaled Mashaal, the head of the Hamas political bureau in Damascus. At this meeting, Mashaal thanked Yildirim for the support that the IHH organization gives to the Hamas.[688] In January 2010, the leader of the IHH organization visited the Gaza Strip and even met with Ismail Haniyeh, the Hamas prime minister in the Gaza Strip.[689]

683 *IICC report* (May 26, 2010), *Id.*, at 1-2.

684 *Id.*

685 In this context see *IICC report* (Sep. 20, 2010), *Id.*, at 2, which describes an interview with an Iranian investigator named Yazdan Karimi to the Iranian news agency Fars regarding the IHH organization. In the interview, Karimi states that the IHH organization was founded in 1992 by Turkey's Mujahidin (Jihad warriors), where its immediate goal was to assist Muslims fighting in Bosnia-Herzegovina and other regions. At that time the Turkish Mujahidin asked for the assistance of the Red Crescent in order to provide aid to those injured by the war in Bosnia but their request was denied. Therefore, according to Karimi, the IHH decided to establish itself as an organization offering aid to Muslim nations in combat zones which would also aid other poor and vulnerable groups throughout various regions of the world.

686 *IICC report* (May 27, 2010), *Id.*, at 2-3.

687 *Id.*

688 *Id.*; see also *The Spittoon: Viva Palestina, Mahathir and IHH*, www.spittoon.org/archives/4168 (2009).

689 See *IICC report* (May 27, 2010), *supra* note 83, at 3; see also Velfecr: Gazze'de Göz Yaşartan

In 2008, Minister of Defense Ehud Barak declared that 36 organizations, including the IHH organization, which are members of the "Union of Good" coalition, an umbrella organization of over 50 Islamic foundations throughout the world and which transfers funds, *inter alia*, to the Hamas organization, were "prohibited associations".[690] In November 2009, the IHH organization sent an activist on its behalf, Mr. Izzat Shahin, to the West Bank in order to establish another branch of the organization there. In the context of his activities, Shahin raised tens of thousands of dollars for two leading Hamas associations operating in the West Bank.[691] Shahin was detained for investigation by the Israeli security forces in April 2010 on suspicion of financing terror and supporting the Hamas organization, and he was deported from Israel, upon the conclusion of the investigation, at the request of Turkish officials. It is further noted that on July 12, 2010, the German government also declared the IHH organization to be an "prohibited organization" because of its economic assistance and support to the Hamas, and in effect outlawed it throughout Germany.[692] In recent months, an American examination is being conducted to potentially declare the IHH organization as an organization that finances terror, i.e., an organization included on the "black lists" of the U.S. Treasury Department towards which economic sanctions can be imposed.[693]

It should also be noted that the IICC report dated May 27, 2010, states that in the past, the IHH organization maintained contacts with global Jihad elements, through which it assisted terrorist cells in Bosnia, Syria, Iraq, Afghanistan and Chechnya, mainly by giving logistical support for transferring weapons and funding.[694] However, the IICC report noted

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Büyük Buluşma (Video-Foto), www.velfecr.com/gazza-de-goz-yasartan-bulusma-video-foto-1408-haberi.html (2010).

690 Declaration 5822 by Defense Minister *Declaration of Unlawful Organization - Union of Good* 3521 (May 26, 2008) www.mod.gov.il/pages/general/pdfs/teror.pdf; it should also be mentioned that in May 2008 the United States officially declared the Union of Good to be an organization sponsoring terrorism and as such it was included in the "black list" by the Treasury Ministry in Washington D.C., found in the folder marked by the Commission as exhibit 149.

691 Hebron Islamic Charity Society and Al-Tadhamun organization in Nablus; see *IICC report* (May 27, 2010), *supra* note 83, at 4.

692 See the statement made by the German Minister of the Interior de Maizière, *Completion of Required Facts from the Foreign Office* 1 (data completion by the Foreign Ministry, Nov. 22, 2010), in folder marked by the Commission as exhibit 149: "The IHH offers knowing and focused support to organizations directly linked to Hamas […] and thus enables Hamas to allocate more financial resources to fund its terrorist activities. The IHH thus lends support to the increase of violence and terrorism in the Palestinian Authority's territories". Though we are dealing with two separate branches of the organization there seems to be a connection between the German branch and the Turkish branch.

693 *Id.*, at 2.

694 *IICC report* (May 27, 2010), *supra* note 83, at 5-8; Danish Institute for International Studies,

that it did not possess updated information regarding the aforesaid links of the organization.[695] In his closed testimony, the head of the Mossad testified that the Mossad's assessment was that some of the funds raised by the IHH organization were provided to the Islamic Jihad.[696]

The IICC report dated June 20, 2010 implies that there is a connection between the IHH organization and the government of Turkey. The leader of the organization, Yildirim, enjoys close relationships with the most senior members of the Turkish government, including the Turkish Prime Minister, Recep Tayyip Erdoğan.[697] It should be noted in this context that the protocol of a meeting held on May 16, 2010, among representatives of the leading organizations that participated in the flotilla and several captains of vessels planning to join the flotilla (hereafter: **protocol of the flotilla leadership meeting**), which was taken from the computer of one of the flotilla participants, indicates that the IHH deputy president, Yavuz

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an independent research institute which deals with interdisciplinary research into international issues, in 2006 study presented the organization's connections with the Al Qaida organization, see, Evan F .Kohlmann, *The Role of Islamic Charities in International Terrorist Recruitment and Financing*, Danish institute for International Studies, (2006), *available at* www.diis.dk/graphics/Publications/WP2006/DIIS%20WP%202006-7.web.pdf.

695 This study, which was conducted by senior American terrorism researcher, Dr. Evan Kohlman and dealt with the involvement of charity organizations in assisting terrorism, mentioned among other facts that in December 1997 the Turkish authorities launched an investigation regarding the IHH organization following a claim that senior members of the organization purchased automatic weapons from extremist Islamic organizations. Following this there was a raid on the organization's office in Istanbul, activists were arrested and weapons and explosives were found along with instruction on how to make bombs, a flag with a jihadist message, and various documents which reveal that the members of the organization planned to take part in jihadist activities in Afghanistan, Bosnia, and Chechnya, *Id.*, at 10-11. The research also quotes a report composed by French intelligence which states that the leader of the organization, Bülent Yıldırım, has directly acted in the past to recruit former members of the military to jihadist activity. The report also mentions that a number of activists were sent by the IHH to combat zones in Islamic countries with the goal of obtaining combat experience and that the IHH organization provided Muslim combatants in these countries with financial aid, weapons, and explosives. The research also mentions that an examination of the phone calls conducted by the IHH activists in Istanbul in 1996 reveals repeated interactions with an Al Qaeda hostel in Milan Italy as well as with Algerian terrorists acting in Europe, including a senior member of Al Qaeda named Abu Ma'ali (Abdelkader Mokhtari) who was active in Bosnia. It was also mentioned that following the American invasion of Iraq in 2003 Yildirim and the IHH organization served a role in anti-western incitement among Turkish Muslims, including protests, marches, and demonstrations.
IICC report (May 27, 2010), *supra* note 83, at 5. Regarding the IHH organization's links to organizations linked to Al Qaeda see also Jean-Louis Bruguiere, Ce Que Je N'ai Pas Pu Dire (Robert Laffoat ed., 2009).

696 Transcript of session no. 8 "Testimony of Mossad Head" (Sep. 14, 2010), at 20.

697 *IICC report* (Jun. 20, 2010), *supra* note 83, at 2.

Dede, stated that the Prime Minister of Turkey and several other ministers had recently begun expressing support for the flotilla:

> "Government did not announce openly support for mission at first; but last few days. Getting direct support from PM and other ministers. During F2F discussions, openly said that if we have any difficulties, gov will extend what support they can. During Dec. land convoy, although gov didn't announce support, they provided, not only to Turkish, but to all who were on the mission."[698]

As stated, from what is known, the IHH organization was one of the leading organizations which took part in organizing the flotilla that is the subject of this report. The IHH organization owns the *Mavi Marmara* and the *Gazze* ship.[699] According to the IICC report from May 27, 2010, during the months preceding the departure of the flotilla, the organization assisted the Ministry of Transportation and the Ministry of Public Works of the Hamas administration to undertake projects in the Gaza Strip in order to prepare the port to receive the vessels taking part in the flotilla.[700] During the police investigations conducted after the event, some of the flotilla participants stated that the IHH organization was behind the organizing of the flotilla[701] and that they themselves are activists in the organization (some of them even receive salaries from

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698 See *IHH Flotilla Campaign Summery*, *supra* note 209; it should also be mentioned that Amir Akan, a crew member on board the Gazze which participated in the flotilla along with the Marmara, claimed in his investigation by Military Intelligence that the Turkish government approved the ship's departure towards Gaza. Due to this fact he felt relatively safe during the flotilla, see article 03/06/10/821/5062, *Military Intelligence Reports*, *supra* note 491.

699 In the Marmara's registration certificate, which was issued on May 19, 2010, the IHH organization (Insan Hak ve Hurriyetleri ve Insani Yardim Vakfi - Turkey) appears as the owner, see Provisional Registration Certificate D/RG/0333/UAE (May 19, 2010), the folder containing the exhibit was marked as folder 92 by the Commission; likewise, the Gazze's registration certificate, which was issued on Apr. 1, 2010, see Certificate of Registry DM10GS0143Q254937 (Apr. 1, 2010), the folder containing the exhibit was marked as folder 93 by the Commission; the investigation of some of the flotilla's participants, members of the IHH, by the IDF's investigative unit, also reveals that all the vessels were purchased by the organization, see report of the investigation of Ismail Yalmez, article 03/06/10/895/5026, *Military Intelligence Reports*, *supra* note 491.

700 *IICC report* (May 27, 2010), *supra* note 83, at 9.

701 In total 41 participants of the flotilla on board the Marmara were investigated, of which 13 mentioned the connection between the flotilla and the IHH organization; this connection also came up in the investigations of about 105 flotilla participants conducted by the IDF investigative unit between the dates May 31, 2010 and Jun. 3, 2010.

it),[702] or that they had joined the flotilla at the request of the organization.[703]

702 See for example Mr. Takir Eurdnach's statements to the police, according to which he is an employee of the organization , suspect 18 statement, *Soldiers, Doctors, and Suspects Statements* (Jun. 1, 2010), the folder containing the exhibit was marked as folder 71 by the Commission [hereinafter *Soldiers, Doctors, and Suspects Police Statements*]; suspect 18's statement, *Soldiers, Doctors, and Suspects Statements* (Jun. 2, 2010) *Id.*; see also the report of Muhassan Ingin's investigation, wherein he admitted that he is an IHH activist, article 03/06/10/825/5090 *Military Intelligence Reports*, *supra* note 491; report of Yishar Kotli's investigation, wherein he admitted that he works as the IHH's secretary-general, article 03/06/10/825/5056, *Id.* ; report of Mehmet Bulga's investigation, who was on the Gazze ship, wherein he admitted that he works at the IHH's archives, article 03/06/10/821/5057, *Id.*; report of Enfi Sinan's investigation, wherein he admitted that he is a member of the IHH, article 03/06/10/821/5077, *Id.*; report of Abdullah Izikiah's investigation, wherein he admitted that he started working as a volunteer for the IHH, but has been an employee of the organization for seven years, article 03/06/10/821/5069, *Id.*; report of Ismail Ylmez's investigation, according to which he has been working for the IHH organization as head of product purchasing, article 03/06/10/895/5026, *Id.*; reports of the captain of the *Mavi Marmara*, Mehmut Torel's investigation, wherein he stated that the IHH hired his services for the flotilla, articles 03/06/10/825/5080 and 03/06/10/825/5092, *Id.*; report of the captain of the Defney ship's captain Haluk Kulkwan's investigation, according to which IHH workers and cargo were on the ship, article 03/06/10/825/5081, *Id.*; reports of Hussein Uruz's investigation, according to which he has been working for the IHH organization for seven years and deals with the organization's ties to foreign organizations and the media, article 03/06/10/825/5060 and article 03/06/10/825/5050, *Id.*; report of the head of the IHH, Bülent Yıldırım's investigation, according to which three of those killed in the flotilla were IHH volunteers, article 03/06/10/825/5059, *Id.*; report of Muhammad Achmed Salam's investigation, according to which he is a reporter for the organization, article 03/06/10/825/5060, *Id.*; report of Mehmet Ozmesha's investigation, according to which he is a donor to the organization, as well as a volunteer, article 03/06/10/825/5036, *Id.*; report of Radouan Kayah's investigation, according to which he organized donations for the organization and is also a volunteer in it, article 03/06/10/825/5062, *Id.*

703 See Muchram Gonash's announcement to the police, according to which he is a volunteer at the IHH, testimony of suspect 3 of *Soldiers, Doctors, and Suspects Police Statements*, *supra* note 702; Mustafa Butran's announcement that he was employed on the ship by his uncle, who works for the IHH, testimony of suspect 7, *Id.*; Gili Muchitin's announcement that he offers humanitarian aid in different counties on behalf of the IHH, testimony of suspect 22, *Id.*; Zachariah Kaya's announcement that he took part in the flotilla which was organized by the IHH, as an employee of a humanitarian aid organization from Istanbul, testimony of suspect 24, *Id.*; Pati Kiukodan's announcement that he was requested by the aid organization he works for to join the flotilla organized by Bülent Yıldırım (head of the IHH), testimony of suspect 41, *Id.*; see also the report of Manuel Vespiner's investigation according to which he was invited to the flotilla by the IHH, article 03/06/10/821/5097, *Military Intelligence Reports*, *supra* note 491; report of kukirian Guyan's investigation, whose friend wished to hire him as a crew member on board the Marmara, and according to whom the IHH group "controlled" the vessel and gave instructions to the passengers, the crew members, and the journalists, article 03/06/10/825/5085, *Id.*; report of Abdel Hakim Alkteibi's investigation, according to which he was invited to the flotilla by the IHH, article 03/06/10/825/5044, *Id.*; report of the head of the IHH, Bülent Yıldırım's investigation by the IDF investigative unit, according to which three of those killed in the flotilla were IHH volunteers, article 03/06/10/825/5030, *Id.*; report of Oskan Tonboylu's investigation, according to which aside from the flotilla he took part in other IHH activities, article 03/06/10/825/5063, *Id.*; see also an interview with one of the participants of the flotilla given to an Haaretz reporter in Belfast, Noam Sheizaf *Testimony from the Deck:*

Other participants in the flotilla, who stated that they had joined the flotilla due to humanitarian motivations alone, also stated that they had responded to appeals from the IHH organization or had signed up for the flotilla through it.[704] Also, the transcript of the flotilla leadership meeting indicates that the IHH organization set up a command headquarters for the flotilla on land, where the deputy director of the organization, Yavuz Dade, stayed.[705]

163. The transcript of the flotilla leadership meeting indicates that the other organizations which took part in organizing the flotilla are as follows: the Free Gaza Movement (hereafter: **FGM**), the European

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Kenneth O'Keefe, Former Marine, was on board the Marmara Wishing to reach Gaza Haaretz Online 24.9.2010, as well as *IICC report* (Sep. 27, 2010), *supra* note 83.

704 See for example the announcement of Halim Yizigi according to which he reached the flotilla following the publication and convention the IHH organization held regarding the flotilla meant to provide aid for Gaza, testimony of suspect 19 of *Soldiers, Doctors, and Suspects Police Statements*, *supra* note 702; the testimony of Pkar Shukri, within which he stated that Bülent Yıldırım (head of the IHH) is the flotilla organizer and that he himself joined the flotilla in order to help Gaza, following IHH publication, testimony of suspect 20, *Id*.; Police testimony by Mehmet Ali Akdniz, according to which the IHH members gave the Marmara passengers orders and "ran the show", according to his statement he joined the flotilla through the organization's website in order to provide humanitarian aid to Gaza, testimony of suspect 21, *Id*.; Police testimony by Ribha Kumrok, according to which the IHH advertized an invitation to volunteer for the flotilla, see testimony of suspect 8, *Id*.; Police testimony by Pikari Krawil, according to which he joined the flotilla with the purpose of providing aid, following publication in the media and a conference held by the IHH, testimony of suspect 23, *Id*.; Police testimony by Ikhsan Shamrock, according to which he signed up for the flotilla through the organization's website in order to provide humanitarian aid to Gaza, stayed at a hotel in Istanbul through the organization and departed to Antalya on a bus provided by the IHH, where he took part in a conference held by the members of the organization who wore special uniforms and got on a bus to the port provided by the IHH, testimony of suspect 25, *Id*.; Police testimony by Abdulhalim Al Mali, according to which he joined the flotilla through an IHH campaign with the purpose of providing aid to Gaza, testimony of suspect 26, *Id*.; see also the report of Adil Yuksel's investigation, who volunteered for the flotilla through the IHH, according to his statement, the *Mavi Marmara* was actually being run by the IHH, and some of the organization's members wore vests emblazoned with the organization's print, the people on the ship were briefed to act according to the IHH's instructions and at a certain stage of the flotilla the instruction was given that the boarding of the ship by IDF soldiers must be prevented at all costs, article 03/06/10/825/5094, *Military Intelligence Reports*, *supra* note 491; report of Achmed el Dsham's investigation, according to which he signed up for the flotilla through the IHH offices in Istanbul, and according to his statements, the head of the organization distributed instructions to the passengers, briefed the journalists, and was responsible for the whole flotilla, , article 03/06/10/821/5083, *Id*; report of Hakan al Biraq's investigation, article 03/06/10/825/5071, *Id*.; report of Said Ibijiuhalo's investigation, article 03/06/10/825/5082, *Id*.; report of Yujel Kusa's investigation, article 03/06/10/825/5043, Id.; report of Adal Huna's investigation, article 03/06/10/825/5090, *Id*.; report of Adal Tuna's investigation, article 03/06/10/825/5057, *Id*.; report of Hasin Shbar's investigation, article 03/06/10/825/5047, *Id*.

705 *IHH Flotilla Campaign Summary*, *supra* note 209.

Campaign to End the Siege on Gaza (hereafter: **ECESG**), the Greek Ship to Gaza Campaign, and the Swedish Ship to Gaza.

FGM is an organization registered in Cyprus as a human rights organization, with its headquarters located in Nicosia. The organization was founded in 2006, and its website states that it has 28 branches throughout the world. The organization's charter provides that its purpose is to break the siege on the Gaza Strip by means of, *inter alia*, "civil resistance and non-violent direct action", which will establish a permanent sea lane between the Gaza Strip and the rest of the world.[706] The organization began dispatching flotillas to the Gaza Strip in 2008, and was behind the dispatching of eight flotillas, five of which succeeded in reaching the Gaza Strip (in August 2008, in October 2008, in November 2008, and two in December 2008), whereas three were stopped by the navy (the *Dignity* yacht, which attempted to reach the Gaza Strip at the end of December 2008, and the *Spirit of Humanity* vessel, which attempted to reach the Gaza Strip in January 2009 and again in June 2009).[707] Another organization operates within the framework of the FGM, under the name of the "International Solidarity Movement" (hereafter: **ISM**), which has adopted the goal of supporting Palestinian popular resistance activities and opposing Israeli policy in the West Bank and Gaza Strip.[708]

The IICC report of June 10, 2010, notes that the FGM organization had its activists sign a declaration in which they pledge not to use physical or verbal violence against IDF soldiers.[709] However, in its report from September 27, 2010, IICC notes that it possesses an internal document of the organization from March 7, 2010, which was seized on the *Mavi Marmara*, which states in a section on mission strategy that the organization's working assumption is that "the only way for Israel to stop us is to use force." This document analyzes various options for how to act in such a situation, including placing obstacles (encircling the deck with metal rods; scattering sharp obstacles in order to prevent landing from the air), and barricading themselves inside the control room and the engine room.[710] However, it should be noted that the document's heading states that it is a draft that is not intended for distribution. Another document that was seized on the *Challenger 1* contains legal information that, apparently, was intended to be conveyed to the boat's passengers. This

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706 See the organization's website www.freegaza.org.

707 See *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendixes Y, Z.

708 See the organization's website palsolidarity.org.

709 *IICC report* (Jun. 10, 2010), *supra* note 83, at 2.

710 *Draft - Not for Distribution* (Free Gaza Movement report, Jul. 3, 2010); see also *IICC report* (Jun. 14, 2010), *supra* note 83, at 6-17.

information explicitly states that the organization is aware of the fact that the transfer of supplies to the Hamas constitutes a crime under the laws of the United States, and also that the United Nations added the Hamas to its black list of terrorist organizations. Therefore, the Americans and citizens of other nationalities were warned "to avoid even the appearance of material support" for the Hamas or its leadership.[711]

The ECESG is an umbrella organization uniting about 30 non-governmental organizations (NGOs), whose purpose is "to bring to an end Israel's illegal siege of Gaza". The organization operates in cooperation with politicians, academics, and human rights organizations throughout Europe. It should be noted that one of the founders of the organization (and one of the organizers of and participants in the flotilla which is the subject of this report) is Amin Abu Rashed, a Palestinian holding a Dutch passport, who is identified with the "Muslim Brotherhood" and with organizations connected to it in Holland and Europe.[712]

It is further noted that the official protocol of the flotilla leadership meeting does not mention any plans for violent action against the IDF, and that in this forum it was decided that the question of how to protect the passengers' security would be left to the discretion of the vessels' captains.[713]

The Participants on the Flotilla

164. The total number of participants on the flotilla was approximately 700 passengers, from 40 countries.[714] On the *Mavi Marmara*, there were approximately 590 passengers from 34 different countries, including

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711 *Legal Information* (Opinion by Free Gaza Movement); see also *IICC report* (Jun. 14, 2010), *supra* note 83, at 4-5.

712 *IICC report* (Oct. 5, 2010), *Id.*, at 5.

713 *IHH Flotilla Campaign Summary*, *supra* note 209. From the [protocol it arises that the flotilla organizers discussed several options for the way events at sea might develop, and among other options took into consideration the possibility of fire being directed at them or an arrest of the people on board the ship; as to the possibility of shooting it was written:

714 "Opening fire
a) Just to intimidate, we keep moving forward
b) Need to do political and media work at the same time
c) Continue slowly, communicating with Israel
d) If shooting is more serious will need to stop and assess. Captains will have to make decisions concerning safety of mission.
e) We all stay together…"
For a detailed analysis of the national and organizational affiliations of the passengers on board the Marmara as well as the outlines of various organizations and activists on board the Marmara, see the list of passengers found on the *Mavi Marmara*, *IMO Passenger List* (May 27, 2010); *IICC report* (Sep. 26, 2010), *supra* note 83, at 8-104.

Turkey (most of the participants, approximately 353 passengers), Britain, Kuwait, Bahrain, Australia, Spain, Belgium, Macedonia, Malaysia, Ireland, Lebanon, Algeria, France, New Zealand, Pakistan, South Africa, Indonesia, United States, Germany, Canada, Greece, Norway, Morocco, Yemen, Syria, Serbia, Kosovo, Bosnia, Sweden and Israel. According to an analysis conducted by the IICC, the passengers can be divided into the following three categories, based on their organizational affiliation:

(1) Ninety-one activists and volunteers of the IHH organization, including the organization's leader, Bulent Yildirim. Approximately 40 activists from this group boarded in the port of Istanbul without a security check, and the rest, including Bulent Yildirim, boarded in the port of Antalya.

(2) Over 200 activists from non-governmental organizations and bodies (NGOs), most of whom were from Turkey and a few of whom were from other countries.

(3) Hundreds of volunteers who responded to the appeals of various organizations to participate in the flotilla. Also prominent among the passengers were journalists, many of whom were from the Arab world (including representatives of two Hamas television stations), and dozens of members of parliaments from, *inter alia*, Germany, Kuwait, Ireland, Yemen, Egypt, Algeria, and Israel.

165. The investigative material that was furnished to the Commission by various authorities indicates that there was a "hardcore group" of about 40 IHH activists who boarded the *Mavi Marmara* separately and without any security checks in the port of Istanbul, while the rest of the passengers had been asked to gather independently in Antalya on May 26-27, where they boarded the vessel after undergoing security checks.[715] A large amount of equipment was found on the *Mavi Marmara* which, apparently, had been taken aboard in Istanbul: 150 protective ceramic vests, which had the flag of Turkey printed on them,[716] 300 gas masks

715 See *IDF Completion Response of 7.11.2010*, *supra* note 486, at appendix G; *The Eiland Report*, *supra* note 402, at 38; *IICC report* (Jun. 10, 2010), *supra* note 83, at 2; *IICC report* (Jun. 7, 2010), *Id.*, at 3; In his testimony before the Military Intelligence investigating the event the captain of the Marmara mentioned that in fact only Antalya had metal detectors in spite of the fact that the ship collected 40 passengers from Istanbul, see article 03/06/10/825/5093, *Military Intelligence Reports*, *supra* note 491.

716 There is uncertainty regarding the number of protective Kevlar vests found and their number in the various IDF reports fluctuates between 100 to 150 units, see main findings from inquiry 1/06 of Collection Branch Head, Deepening and Broadening the General Staff's Experts Inquiry (Aug. 25, 2010), marked by the Commission as exhibit 90 [hereinafter *Inquiry Expansion of 25.8.2010*], where it is mentioned that 100 vests with the Turkish flag drawn on them were distributed to some of the *Mavi Marmara's* passengers

and about 200 additional filters, communication devices, optical devices (several night vision goggles and a few binoculars), 50 slingshots of various kinds, 200 knives, 20 axes, thousands of ball bearings and stones, disk saws, pepper sprays, and smoke flares. A few flags and scarves of the Hamas and its military wing were found,[717] as well as a telescopic rifle sight and ammunition (rifle bullets),[718] scuba-diving gear and spear guns,[719] and a field hospital.

166. The material before the Commission also indicates that the group of activists that boarded the vessel in Istanbul designated itself using various identification stickers. Some of them wore stickers identifying them as "crew". Others wore red stickers with the words "*khares amni*", i.e., identifying them as a "security guard".[720] According to the soldiers' testimonies, the violent activists also wore ceramic vests under their life jackets (which, apparently, were also distributed to the doctors and the journalists).[721] The testimony of the chief officer of the

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in advance; in the summary of the combat equipment found on board the ship conducted by the Naval Intelligence company, on the other hand, it was mentioned that 150 military protective vests made in Turkey were found on board the ship; see also *IICC report* (Jun. 7, 2010), *supra* note 83, at 6, according to which about 100 Kevlar vests were found on board the Marmara as well as *IICC report* (Jun. 10, 2010), *Id*., at 3, according to which about 150 vests were brought on board the ship.

717 Some of the slingshots, for example, were inscribed with "Hezbollah", see *IICC report* (Jun. 7, 2010), *Id*., at 6; *IICC report* (Jun. 10, 2010), *Id*., at 3; As for the scarves, see also the summary of combat equipment conducted by the Naval Intelligence company, *Inquiry Expansion of 25.8.2010*, *supra* note 716.

718 It should be mentioned that four bullet casings not used by the IDF were found on board the *Mavi Marmara*, likewise, a bullet recovered from the knee of one of the injured solider was also not a standard IDF bullet. At the same time, Mr. Giora Eiland, the head of the IDF's expert team appointed to investigate the event, mentioned that it cannot be said with complete certainty that these were bullets fired from a non-IDF weapon since it cannot be ruled out that these bullets somehow made their way into the IDF ammunition, see protocol of meeting 7 by the Commission, *Testimony of the Head of the Expert Inquiry Team* (Aug. 24, 2010), at 6 [hereinafter *Closed Door Testimony of the Head of the Expert Inquiry Team*]; *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 30 ("in retrospect it turns out we had such bullets. Since 2007 the Shayetet does not know this. But I can't say definitively […]").

719 See summary of combat equipment found on board the ship conducted by the Naval Intelligence company, *Inquiry Expansion of 25.8.2010*, *supra* note 716.

720 See *IDF Completion Response of 7.11.2010*, *supra* note 486, at appendix G.

721 See for example the testimony of soldier no. 8, 4 ("another fact that showed that they were preparing for a violent struggle were the orange vests which in retrospect turned out to be Kevlar vests"); the testimony of soldier no. 7 ("they had protective vests, some had gas masks"); the testimony of the Commander of the Takeover Force ("as far as I am concerned terrorists are an armed group dressed for battle - protective vests masks and facial covers"). *Inquiry Expansion of 20.9.2010*, *supra* note 451; the testimony of soldier no. 24, at 2 ("while handcuffing I noticed that he's dressed in a protective vest. I also checked the other people and saw they were wearing protective vests"); the testimony of soldier no. 26, at 1 ("some of the terrorists were dressed in large protective vests"), the testimony

vessel, Mr. Gokkiran Gokhan, indicates that the IHH people distributed communication devices to the activists, which they used to communicate amongst themselves.[722] Communication devices were also distributed to the vessel's crew members, but they were calibrated on a different frequency.[723] According to various testimonies, these activists stayed on the roof and maintained a separation from the rest of the passengers on the *Mavi Marmara* during the voyage.[724] Inside an area designated as a press room, where the journalists were concentrated, with a guard from the IHH organization stationed at its entrance, another secured area was set up, which was protected continuously by two IHH guards. Yildirim and other activists stayed there. This area also contained an editing room and the computers connected to the ship's closed circuit security cameras.[725]

The statement of the chief officer of the *Mavi Marmara*, Gokkiran Gokhan, indicates that the people from the IHH took control of the vessel during the journey and prevented people whom they did not know from moving about freely:

> Interviewer: You seem to be saying that the people from IHH were in control of the ship. Did the crew need their permission to move around the ship?
>
> Chief Officer: Definitely, they didn't let the people they didn't know move around.
>
> Interviewer: Did they prevent anyone they didn't know from moving freely around the ship?
>
> Chief Officer: Yes, definitely.
>
> Interviewer: Was that from the first moment they went up on deck?
>
> Chief Officer: Yes, definitely.
>
> ....
>
> Interviewer: I don't understand, they didn't let the passengers and crew go from one deck to another?
>
> Chief Officer: They could go anywhere, except to the control center they set up on the bridge.

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of soldier 16, 1 ("we identified a group of terrorists with protective vests"); testimony of soldier no. 27, at 1 ("while scanning we found some of the people had protective vests"), *IDF Completion Response of 7.11.2010*, *supra* note 486; see also *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 29; *IICC report* (Jun. 7, 2010), *supra* note 83, at 6.

722 The transcript of the testimony was published in *IICC report* (Jun. 9, 2010), *Id.*, at 8; See also *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix N.

723 *Id.*

724 See for example the testimony of the commander of Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 6-7; see also *IICC report* (Jun. 1, 2010), *supra* note 83, at 7.

725 *IICC report* (Jun. 10, 2010), *Id.*, at 7.

Yildirim was interviewed frequently by the media during the voyage on the *Mavi Marmara* towards the Gaza Strip, and he said, *inter alia*, that although the resistance by the flotilla participants would not be violent, they would not let IDF soldiers board the vessels.[726] During a press conference held before the *Mavi Marmara* left Antalya, Yildirim stated, "We are determined to enter Gaza, regardless of what happens."[727] In a video found on the *Mavi Marmara*, which apparently had been filmed by one of the photographers who documented the events on the roof, Yildirim is seen speaking heatedly before a large crowd of listeners. Yildirim said, *inter alia*: "If you send in the commandos, we'll throw you down below from here, and you'll be humiliated in front of the whole world."[728]

An article in Turkish written by the journalist Adham Ozkaze for "The World Bulletin" newspaper, which was headlined "*Mavi Marmara* is Ready to Resist ", found on one of the computers seized on the *Mavi Marmara*, states that the activists on the ship were preparing for "civil resistance" and they had taken it upon themselves "to defend the ship". This article also reports that the activists were unwilling to divulge their strategy for defending the vessel, but they said, "We will teach the Israelis a lesson they won't forget and the Israeli army will be humiliated before the eyes of the entire world."[729] On various videos that were seized on the *Mavi Marmara* and in a report which was broadcast on the Al-Jazeera station live from the *Mavi Marmara* two days before the events, some of the passengers on the ship are seen singing songs of praise for the intifada and calling out impassionedly.[730] In the same report, one of the passengers on the ship who was interviewed, Shaza Barakat, said: "Two good things will happen: either we will die as *shaheeds* or we'll reach Gaza."[731] In films taken on the *Mavi Marmara*, other activists are seen expressing the desire to die as *shaheeds*, and saying goodbye to their family members.[732]

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726 See transcript of the first officer's testimony, *supra* note 722.

727 *IHH: Yildirim: We are Going to Leave in Due Course*, *available at* www.ihh.org.tr/yildirim-zamani-gelince-yola-cikacagiz/en (2010).

728 *IICC report* (Jun. 20, 2010), *supra* note 83, at 8, appendix - *Specific Remarks by Bülent Yıldırım*.

729 *IICC report* (Jun. 17, 2010), *Id*., at 1-2; The video file *Instigating the Crowd on Board the Mavi Marmara by the Head of the IHH and Other Activists* may be seen on the IICC's website (video clips file 4).

730 *IICC report* (Jun. 10, 2010), *Id*., at 12.

731 *IICC report* (Jun. 13, 2010), *Id*., at 1; The video file *Instigating the Crowd on Board the Mavi Marmara Prior to the Encounter with IDF Forces* may be seen on the IICC's website (video clips file 2).

732 *IICC report* (Jun. 13, 2010), *Id*., at 1; A television report from the Al Jazeera channel from May 29, 2010, which was broadcast from the ship two days prior to the encounter with the IDF forces may be seen on the IICC's website; in the interview given to Al Jazeera by Hasin Urush, a senior IHH member and among the flotilla's organizers, a number of

167. The passengers' testimonies and the interrogation of the captain and chief officer of the *Mavi Marmara* indicate that on May 30, 2010, at approximately 10:00 p.m., after the announcement of the navy was heard, which requested the ships to reverse their course or to redirect the vessel's course to the port of Ashdod, an order was given to all the non-Turkish passengers to enter the hall on the lower deck, while the Turkish IHH people were told to go up to the upper decks. The *Mavi Marmara's* sirens were activated, and an order was given to don flotation vests. At the same time, the activists began to saw chains and other items from metal (approximately 100 iron rods and 50 improvised clubs were found on the *Mavi Marmara*)[733] and to collect axes (which were taken from the ship's fire extinguishing equipment stations; a total of about 20 axes), knives (which were taken from the kitchen and the cafeterias on the ship; a total of about 200 knives of various sizes were found); hammers, tools, bolts and bottles found on the ship. The activists were divided into groups which were stationed in several different areas: one group gathered on the roof of the ship; another group apparently concentrated near the roof and served as reinforcements for the resisters on the roof; and another group gathered at the ship's stern. Some of the groups were given an advance briefing.[734] The activists were equipped with ceramic vests, most

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days prior to the takeover he went on to say that all the passengers were willing to die as "Shaheeds" since the goal of the flotilla was to reach Gaza or be killed (Al Jazeera story from Jun. 5, 2010). For similar materials see audio file "Shahid.mov", in folder *Video*, *Arab Data Disc*, *supra* note 506.

733 See video files "motot1.mov" and "motot2.mov" in folder *Video*, *Arab Data Disc*, *supra* note 506. The videos, 20 and 34 seconds long accordingly, show three activists on board the Marmara at night, using an electric disc saw to remove iron bars from the deck's railing' see also of Yishar Kotli's investigation, article 03/06/10/825/5056, *Military Intelligence Reports*, *supra* note 491. During the investigation of the IHH volunteer he stated that at a certain stage when they started receiving messages from the Israeli Navy "the blood rose to the head" of a lot of youngsters on board the ship, some of them sawed metal bars off the ship's railing with electric saws and at a certain stage the ship's captain (who is not a member of the IHH) asked over the public address system that people desist from sawing said bars.

734 According to the Marmara's security cameras it arises that on May 30, 2010 at 21:36 (according to the clock in the security camera) a number of activists concentrated at the ship's stern and one person arrived with a bunch of wooden poles and distributed them among those present. Also according to the security camera on May 30, 2010 at 22:03 (according to the clock in the security camera) a group of men, all dressed in life jackets, are seen gathered together for a briefing, when some of those present are holding wooden poles. Later on, near the start of the Marmara's takeover on May 31, 2010 at 04:22 a group of men is seen, all dressed in life vests, some holding gas masks in their hands, and they appear to be pointing at the sea (apparently towards the Navy ships drawing closer to the Marmara), and they call their friends to join them, and indeed several additional men join the group. See video files from the security camera in folder *Security Cam*, *Arab Data Disc*, *supra* note 506. See also the report of Hussein Uruz's investigation, article 03/06/10/825/5050, *Military Intelligence Reports*, *supra* note 491. This person stated

of them were equipped with gas masks, and some of them were equipped with clubs, iron rods, chains, slingshots and ball bearings.[735] The material obtained by the Commission also indicates that during the briefing given by Yildirim, he instructed the activists to "make a human chain and throw the commandos back into the sea with chairs and rods."[736]

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that, on the eve of the takeover he saw protective vests and gas masks being handed out to some of the passengers and noticed two passengers with slingshots. Likewise, as he stated, there were fanatics among the passengers, though the majority expressed opinions supporting passive resistance only.

735 Facts regarding the equipment used by the resistors, as stated, may be learned from several sources: *First*, a video shot by the IDF forces after the Marmara has docked at Ashdod Port which documents a concentration of some of the combat equipment used by the resistors and brought down from the ship: hundreds of Gas masks, many dozens of knives (kitchen knives as well as commando knives, one of which seems to be covered in blood), hundreds of marbles, crowbars, wooden and iron rods in large quantities (several dozen), various sprays. See CD *From Peace Cruise to Terror Cruise* submitted by the army (minute 4:27), found in a folder marked by the commission as exhibit 89.

736 *Second*, mobile Forensics lab report by the police from Jun. 2, 2010 (document 66 in the police file, folder 72 of the commission's exhibits), which documents the collection of many bars, clubs, pipe wrenches, some of which were covered with blood. According to the mobile forensics lab's report there is indication that the bars found were sawn off the ship's railing; see also, photo CD and video clip documenting the mobile forensic lab's visit to the ship, during which clubs, knives of various types, gas masks, screwdrivers, glass bottles and axes are seen, all of them found on the Marmara, and corresponding with the descriptions regarding physical violence employed by the resistors on board the Marmara, marked by the commission as exhibit 75.45. Some of the photos were printed onto photograph boards (documents 67-69 in the police file, folder 72 of the commission's exhibits).

Third, the video shot by one of the cruise participants on 30.5.2010 at 03:55 (according to the file properties on the digital camera), participants are seen opening crates and taking out life jackets and gas masks. The gas masks are packed and new. One of the people is seen holding a gas mask and stating "Allahu Akbar" at the camera. See video file "00234. mov" in folder *STREAM* in folder *BDMV*, in folder *AVCHD* in folder *Sony3* in folder *Video*, *Arab Data Disc*, *supra* note 506.

Fourth, one of the IHH volunteers on board the Marmara testified to the Military Intelligence investigators that at a certain stage, thugs (as he called them) from the IHH distributed clubs and iron bars (and he himself was also armed with one), see report of Adil Yuksel's investigation, article 03/06/10/825/5094, *Military Intelligence Reports*, *supra* note 491.

Fifth, IDF soldiers taking over the Marmara testified about the concentration of weaponry and combat gear in the possession of the resistors on board the ship. See, for examples, the testimony of the Commander of the Takeover Force regarding the existence of a large concentration of axes, bars, knives, chains, slingshots, and glass marbles. See also the testimony of Team Commander R, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2, regarding the discovery of flares, sticks, axes, knives, tear gas, gas masks, marbles, bolts, crowbars, metal bars, Kevlar vests with a crescent symbol, various night vision equipment, and more; See also the testimony by the commander of the takeover force, *Id.*, at 4-6.

See Military Intelligence inquiry, submitted to the commission, *Deepening and Broadening the Inquiry - Response to Completion Request by the Public Commission to Examine the Naval Event of 31.5.2010*, at appendix G, transferred by the IDF on Nov. 17, 2010, in response to the commission's request of Nov. 7, 2010, at 2, marked as exhibit 90 in the commission's

One of the passengers described the event as follows:

"At 11:30 pm there was a meeting to give orders to the security teams for urgent intervention. Orders were given about how to put on life belts, how to put on gas masks and most important, how to act if there was Israeli intervention or an attack. After the meeting the heads of the teams along with their operatives went to secure the sectors. We were responsible for the upper aft sector of the second deck on the starboard side. We were supposed to deploy for defense. How? Only with sticks and bottles, apparently this is how glass bottles should be used. And life belts, [but] there weren't enough for everyone…"[737]

Another passenger wrote in his journal:

"The Israeli gunboats are approaching…All passengers have been given rescue suits in case the ship is attacked. Everyone has gone to the locations determined beforehand. A press conference was held and broadcast live. IHH leader Bülent Yildirim said that 'it will be a war of nerves until tomorrow morning. There are people here from more than 50 countries. If people are detained, it will sully the honor of more than 50 countries. We want the entry to the Israeli embassies in Istanbul and Ankara to be locked. We will defend ourselves from here. We know there

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exhibits. The inquiry mentions that Yildirim admitted this in his testimony; *IICC report* (Jun. 10, 2010), *supra* note 83, at 8-11. It should also be mentioned that a number of books detailing the events on board the Marmara have been recently published in Turkey. One of them, *The Bleeding Mavi Marmara*, was written by journalist Şefik Dinç, a reporter for the popular newspaper *Habertürk,* who was on board the Marmara, documented the violent confrontation between the IHH activists and the IDF soldiers with his camera, and smuggled the photographs back to Turkey.

737 *IICC report* (Sep. 19, 2010), *Id.*, reviews this book and compares what's stated in it to additional information available to *IICC*. Among other details Dinç describes in his book that there were lively conversations between the volunteers on board the Marmara where the possibility was raised that Israel would attack the ship and the activists were prepared for every scenario and even expressed a willingness to die, as long as the siege is brought to an end. It is also mentioned in the book that during the wait for the confrontation with the IDF several activists practiced drills in preparation for a possible Israeli attack, practiced aiming water hoses to thwart attempts by IDF soldiers to board the ship from the sea, they received guidance regarding the use of gas masks and were instructed on how to resist the IDF soldiers. It was also stated that each one of the people in charge of the passengers' security received a sector and a spot where he had to position himself once the alarm is sounded. Dinç goes on to state that after the Navy ships addressed the Marmara the IHH activists woke up the passengers and distributed life jackets and gas masks among them and organized them for resistance. The position holders took their places in the predetermined spots and the clubs were brought out. Dinç adds that "iron bars were added to the wooden clubs I had seen earlier" and that "according to the image I perceived, the resistance for the possible ascent of Israeli soldiers is not going to be so passive." Likewise Dinç describes a press conference held by Yildirim in the hours prior to the takeover where he declares that "soon we will meet with Israel's true face".
IICC report (Jun. 10, 2010), *Id.*, at 9.

> will be a price and we are willing to pay it. We will not retreat one step. Israel is behaving like a pirate in international waters. [Will] the world watch from the side?'"[738]

Filmed interrogations of the captain of the *Mavi Marmara* and its chief officer indicate that in the evening hours the atmosphere aboard the vessel was tense, and that about two hours before the takeover began, a crowd had gathered on the main deck. The crew members checked and discovered that the activists were using disk saws to cut the railings of the ship and create metal clubs. The crew members of the *Mavi Marmara* stated during their questioning that their attempts to prevent this activity were unsuccessful.[739] The testimonies also indicate that this group was made up of those IHH activists who had boarded the *Mavi Marmara* in Istanbul.

> The captain of the *Mavi Marmara*, Mr. Tural Mahmut, stated:
>
> Captain: There were passengers gathering on the main deck, I asked the chief officer, What is happening there? He said they're cutting the steel rods and the chains on the deck. He said that they are putting the cut railings in the radio room on the bridge. Even when your soldiers took over the ship they went into the radio room and took the cut railings. I had to send the chief officer to collect the railings from their hands, he asked an IHH man, and they gave them to him.
>
> Interviewer: What did they give to him?
>
> Captain: The disks.
>
> Interviewer: But what did they do with the railings and the chains?
>
> Captain: I took this and I threw this in the sea. We knew what would happen if these things get taken to the bridge. After this, we didn't see anything in their hands.
>
> Interviewer: But we saw on the ship that they cut many of the railings.
>
> Captain: What I saw, I threw into the sea [...] I said to them to stop and I took them up. I told the sponsors about this many times.
>
> Interviewer: You were not worried about the violence that would occur?
>
> Captain: I was worried. [...] But I thought that as soon as their commander was with them nothing would happen, nobody

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738 *IICC report* (Jun. 10, 2010), *Id.*, at 13.

739 The transcript of the testimony was published in *IICC report* (Jun. 9, 2010), *Id.*, at 2-3; See also *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix N.

would fighting or kicking back. I asked many times, because I knew what would happen, but I thought that because there were citizens on the ship nothing would happen, they would stay on the boat just as civilians, without physical resistance.

Interviewer: You weren't worried about the fact that they were preparing a lot of weapons?

Captain: Whatever I saw I threw into the sea and some I stored in the radio room. I didn't know there was so many.

....

Interviewer: But they were preparing themselves for violence against the soldiers?

Captain: Yes, I was informed that. That's why I warned them, I said to them that the people on the boat came to demonstrate. They saw some helicopters. There was a tense air on the boat, and then I saw people who kept on cutting.[740]

The chief officer of the *Mavi Marmara* stated about the identity of the activists in this group:

"Interviewer: How many IHH operatives were there on the roof?

Chief Officer: Forty.

Interviewer: The same forty all the time or did they change?

Chief Officer: More or less, the same forty.

Interviewer: You're referring to the group that joined the ship in Istanbul?

Chief Officer: Yes."[741]

These testimonies are supported by a number of other statements which were given by participants of the flotilla during questioning by the police and the IDF investigation unit.[742] All of the aforesaid interrogations

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740 *Id.*; The matter of cutting the ship's railing by IHH activists for the purpose of making iron bars also came up in the investigation of the ship's captain by Military Intelligence, see report of Mehmut Torel's investigation, article 03/06/10/825/5092, *Military Intelligence Reports*, *supra* note 491.

741 The transcript of Gukiran Gukehan's testimony was published in *IICC report* (Jun. 9, 2010), *supra* note 83, at 5; *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix N; See also report of kukirian Guyan's investigation, article 03/06/10/825/5085, *Military Intelligence Reports*, *supra* note 491.

742 See for example report of Yusuf Mehmed's investigation, article 03/06/10/825/5029, *Military Intelligence Reports*, *supra* note 491. Mehmed, a citizen of Bahrain, refused to cooperate with the investigation but mentioned that the Turkish passengers (as opposed to the passengers who were citizens of other countries) were the one who acted with violence including, as far as he knew, the use of clubs and slingshots; see also Mehmet Yıldırın's testimony to the police, where he mentioned that one of the passengers wished to hit a soldier, the soldier fell to the floor and the testifier protected him from additional injuries inflicted with an iron bar, testimony of suspect 4 of *Soldiers, Doctors, and Suspects*

strengthen the testimonies of the soldiers that the passengers of the vessel were divided into two types, violent activists (the IHH activists) and non-violent peace activists, and that the IHH activists were armed and behaved like an organized force.

> Soldier no. 4, who was taken below deck, stated:
>
> Q: How did the activists look?
>
> A: They all seemed to be dressed alike, gas masks and an orange vest. They looked well-prepared, they were waiting, and it seemed like it was all planned. They were all very big and heavy, and it looked like their goal was clear, to harm us.
>
> Q: Were there different characteristics among the activists?
>
> A: Yes, it seemed to me that there was a group that was equipped with the gear, and that came to attack us, and the whole way that they were dragging me inside, there were photographers who were photographing me, and I also heard women's voices, including in English, like 'Stop hit him', etc."[743]
>
> The Commander of Center A stated:
>
> "I have no doubt that the terrorists on the vessel planned, organized, foresaw the events, and planned to kill a soldier. They were organized like a military force: equipped with gas masks, protective vests, hot and cold weapons. They were organized in a military structure, divided into groups, they spoke to each other on radios [....]."[744]
>
> The Shayetet 13 commander stated:[745]
>
> "No ordinary civilians knows how to fight at night with a vest and gas mask for a long time, to take a weapon and cock it to shoot, and to not be deterred when they're fighting back with you, unless he has trained for this and has been prepared in advance..."

In the margins, it should be noted that, on his own initiative, Yildirim was interviewed for Israeli television (a report by Oshrat Kotler-Bengal for Channel 10, which was broadcast in Israel on June 26, 2010). The Commission received the interview conducted with Yildirim, in a rough cut format that includes exchanges of words beyond what was said during the official interview. In his statements, Yildirim confirmed that there had indeed been violent organizing by some of the flotilla participants, and he added: "What did you want, flowers?" Yildirim also

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Police Statements, *supra* note 702.

743 Testimony of soldier 4, *Inquiry Expansion of 20.9.2010*, *supra* note 451.

744 Testimony of the Commander of Center A, *Id*.

745 Testimony of Shayetet 13 Commander, *Id.*, at 7.

confirmed that the flotilla participants armed themselves with rods for the confrontation with the soldiers. However, Yildirim hinted that Israel had "planted" anti-Semitic statements by flotilla participants within the videos it distributed and other weapons (such as knives). This claim by Yildirim is not consistent with the original radio recordings, the pictures, and the original and unedited films (which were photographed, *inter alia*, by some of the flotilla participants in real time), which the Commission examined.

The Identity and Organizational Affiliation of the Dead and the Wounded

168. An examination of the identity and organizational affiliation of those who died leads to the following conclusions. Four out of the nine who died have been identified as IHH activists or volunteers. Another four of those who died were activists in Turkish Islamic organizations. Two of them were activists in the Saadet Partisi (hereafter: **Felicity Party**), an Islamic party which was outlawed in Turkey for violating secular articles of the Turkish constitution. The Felicity Party is affiliated with IHH, and it supports the Hamas and maintains connections with it. The head of the party, Professor Numan Kurtulmus, expressed explicit support for the flotilla to the Gaza Strip and called it a "brave historic step." It should be noted that there were in total only four activists from the Felicity Party aboard the *Mavi Marmara*. Another person who died was a 19-year-old who held dual citizenship (Turkish and American) and who, as far as is known, was not affiliated with any organization.

According to the IICC report dated September 27, 2010, with respect to four of the nine who died, their family members stated that they had expressed their desire to die as *shaheeds* (including the young man with the dual citizenship mentioned above). Regarding two of those who died, it was reported that they had left a letter or will prior to boarding the *Mavi Marmara.* In a video which was recorded before the violent confrontation on the *Mavi Marmara*, another one of those who died is heard saying: "I pray that Allah grant us the same good end as those *shaheeds*."[746]

The following are details regarding the identity and organizational affiliation of the deceased:

1. **Ibrahim Bilgen** - 61 years old, citizen of Turkey. He joined the flotilla as an IHH volunteer. In 2007, he was a candidate in the general elections in Turkey on behalf of the Felicity Party, and, in

746 *IICC report* (Sep. 26, 2010), *supra* note 83, at 25.

2009, he was a candidate on its behalf in the elections for mayor of the city of Siirt. He boarded the ship in Antalya. According to the IICC report dated September 27, 2010, one of his family members stated that he wanted to die as a *shaheed*.

2. **Ali Haydar Bengi** - 39 years old, citizen of Turkey. He served as the chairman of an Islamic charitable organization named Ayder. According to the IICC report dated September 27, 2010, Ayder is a charitable organization, and the Ayder branch headed by Bengi cooperated with the IHH. Bengi was a member of the Felicity Party. He boarded the ship in Antalya. His wife and friends said that the he had a strong desire to die the death of a *shaheed*.

3. **Cevdet Kiliclar** - 38 years old, citizen of Turkey. He was an IHH activist who worked as a writer and the manager of the IHH's internet site. He boarded the ship in Antalya. On the flotilla to Gaza, he was employed by the IHH as photographer. In a video taken aboard the *Mavi Marmara*, he is heard saying, "I pray that Allah grant us the same good end as those *shaheeds*."

4. **Cetin Topcuoglu** - 54 years old, citizen of Turkey. He was a member of the charitable non-profit organization, Adyer, a humanitarian assistance organization that cooperates with the IHH organization. He is a former Turkish champion in the martial art of *taekwondo.* He participated in a prior aid convoy to the Gaza Strip, which had reached El Arish, where it engaged in a confrontation with the Egyptian security forces. He boarded the ship in Antalya. According to the IICC report dated September 27, 2010, he left a letter before he departed on the flotilla in which he hinted that he expected to die as a *shaheed* and he called upon others to aspire to a similar death.

5. **Necdet Yildirim** - 32 years old, citizen of Turkey. He was an IHH activist in Istanbul (his name appears on the list of IHH activists which was found on the *Mavi Marmara*).

6. **Fahri Yaldiz** - 43 years old, citizen of Turkey. He was an IHH activist in his city, Adiyaman. Since 2007, he was a security guard at the IHH conferences and he was active in his city. During municipal elections, he served as the bodyguard to the mayor on behalf of the Refah party, which is the Islamic party of Erbakan. His name appears on the list of IHH activists which was found on the *Mavi Marmara.* He boarded the ship in Antalya. According to the IICC report dated September 27, 2010, prior to departing on

the flotilla, he announced that he was going to be a *shaheed* and he said goodbye to his wife and his children.

7. **Cengiz Songur** - 47 years old, citizen of Turkey. He was an activist in the Islamic organization Ozgurder in Izmir. He boarded the ship in Antalya.

8. **Cengiz Akyuz** - 41 years old, citizen of Turkey. He was an IHH activist. He boarded the ship in Antalya. According to the IICC report dated September 27, 2010, he joined the flotilla together with the director of a branch of the IHH organization, Zakariya Kanat, and he left a will before he boarded the flotilla.

9. **Furkan Dogan** - 19 years old, dual citizenship: Turkish and American. According to an article in a Turkish newspaper, "Radical", on June 16, 2010, he wrote in his diary on the morning before the events, ""These are the last hours before I take part in the sweet experience of becoming a *shaheed*. Is there anything more beautiful than that?"[747] Also, according to the IICC report of September 27, 2010, his brother Mustafa said that his family was not sorry that his brother had been killed as a *shaheed*.

169. An examination of the list of wounded which was carried out by the IICC indicated that most of the wounded belonged to the IHH organization and to Turkish and Islamic parties and entities. On the list of the wounded, there is one Indonesian, and there are no wounded from Western countries or from the rest of the Arab world.[748]

Summary of this part: The IHH organization is one of the leading organizations which took part in organizing the flotilla to the Gaza Strip. Activists in this organization, as well as other volunteers who wanted to take part in humanitarian activity on behalf of the Gaza Strip, were recruited to the flotilla. A core of about 40 activists from the organization were equipped and prepared during the journey, particularly during the hours just preceding the takeover, to resist with force the IDF soldiers' taking control of the vessel. This is indicated by the extensive equipment which was brought on board, by their organizing as a group with distinct identity signs who were equipped with communications devices and cold weapons, by the preparations which were undertaken prior to the takeover operation, and by their actions during the event itself. The severity of this resistance was not foreseen by the IDF, within the context of the intelligence assessment prior to the event.

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747 *Id.*, at 26.
748 *IICC report* (Sep. 26, 2010), *Id.*, at 4; *IICC report* (Jun. 20, 2010), *Id.*, at 1.

The Questions before the Commission

170. In this part of the report, the Commission will examine the following legal questions:

1. Were the actions undertaken by Israel on May 31, 2010 to intercept and board the flotilla vessels, outside the blockaded area of the Gaza Strip, in conformity with international law?
2. Was Israel's use of force against the flotilla participants during the interception of the flotilla vessels carried out in accordance with international law?
3. Was the planning and organization of the Israeli military operation carried out in conformity with international law?

Conformity between the Actions Israel Took to Enforce the Blockade on May 31, 2010, and International Law

The Law Governing the Enforcement of the Blockade

171. As discussed in Chapter A of this report, Israel established the naval blockade as part of its international armed conflict with the Hamas. The legal regime governing the establishment and enforcement of such a blockade is the laws of naval warfare. The relevant legal rules can be found in customary international humanitarian law, which have largely been outlined in the *San Remo Manual*. Article 97 of the manual states: "A blockade may be enforced and maintained by a combination of *legitimate methods and means of warfare* provided this combination does not result in acts inconsistent with the rules set out in this document."[749] [emphasis added]

An attempt to breach a properly established blockade is a non-neutral act, resulting in a loss of the protection and relative freedom of navigation available to neutral shipping under the law of the sea. As a result, a ship that attempts to breach a blockade becomes subject to the rules of international humanitarian law governing the conduct of hostilities.

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749 *San Remo Manual*, *supra* note 110, at article 97.

Enforcement in International Waters

172. The Israeli armed forces boarded the *Mavi Marmara* and the other flotilla vessels 70-100 nautical miles from the Gaza coast outside the blockaded area,[750] i.e., in international waters (for a map of the blockaded area, see annex "F").

There has been an ongoing international debate regarding the location at which ships seeking to breach a blockade may be boarded. The key issue in this debate is not whether such boarding may take place in international waters, but rather at what distance outside the blockaded area a party may board a vessel attempting to breach the blockade.

173. According to customary international humanitarian law, an attempt to breach a blockade occurs when a ship is on a course destined for a blockaded port or is anchored or hovering outside a blockaded area so that it can evade the blockading forces.[751] As the *US Commander's Naval Handbook* notes, "[k]nowledge of the existence of the blockade is essential to the offenses of breach of blockade and attempted breach of blockade." Therefore, if it can be established that a ship is purposefully attempting to breach a blockade, that ship is subject to capture wherever it is located.[752] The stated goal of the flotilla was to breach the blockade.[753] Hence, the flotilla organizers and participants must have been aware of the existence of the Gaza blockade and that they were on course towards the blockaded area.

174. The material before the Commission demonstrates that the Israeli forces chose to enforce the blockade outside the blockaded area on the basis of two reasons. First, the intelligence assessment indicated that the Hamas were organizing small boats to meet the flotilla, and there was concern that those boats would pose a security risk if the flotilla vessels were intercepted close to the Gaza coastline.[754] Second, as was outlined in the testimony of the Chief of Staff, Lieutenant-General Ashkenazi, the intention of the Israeli forces was to capture the vessels with the minimum use of force, and, during such an operation, there is a great advantage to operating under the cover of darkness.[755] As a result, the operation was carried out just before dawn, at which point the flotilla vessels were still

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750 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 36.
751 See *Heintschel von Heinegg, EPIL*, *supra* note 91, at para. 43.
752 See *San Remo Manual*, *supra* note 110, at article 98. See also *the 1909 London Declaration,* art. 20; *U. S. Navy, The Commander's Handbook*, *supra* note 92, at 7-8, para. 7.7.4.
753 See *IHH Flotilla Campaign Summary*, *supra* note 209, at 26.
754 *Military Advocate-General's testimony*, *supra* note 98, at 77.
755 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 82.

located outside the blockaded area. These grounds constitute valid and reasonable operational considerations falling within the customary rules regarding the distance from the coast that a blockade can be enforced.

175. The Commission concludes that the Israeli armed forces were justified in boarding the flotilla vessels in international waters under the rules of international humanitarian law, given (i) their location and announced destination;[756] (ii) the public pronouncements by the flotilla organizers and participants regarding their intention to breach the blockade;[757] and (iii) the refusal of the ships' captains to accept the invitation to alter their course to Ashdod after they were warned by the IDF.[758] Therefore, the interception of the flotilla vessels seaward of the announced blockade was lawful.

The Capture of the Flotilla Vessels

176. Customary international law provides that a blockading party is entitled to prevent all vessels from entering or leaving the blockaded area. Merchant vessels believed on reasonable grounds to be breaching the blockade may be captured.[759] Before capturing a neutral vessel, there may be a need to verify its neutral status and its intentions.[760] At the outset, it should be noted that there is an important distinction between a "capture" and an "attack" of such vessels. According to Article 67(a) of the *San Remo Manual*, merchant vessels which are believed on reasonable grounds to be breaching the blockade may not be attacked unless, after prior warning, "they intentionally and clearly refuse to stop, or *intentionally and clearly resist* visit, search or *capture*…"[761] [emphasis added] Neutral merchant vessels do not have a right to resist capture.[762] As the Encyclopedia of

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756 *Id.*

757 *Id.*

758 *Id.*

759 *San Remo Manual*, *supra* note 110, art. 98, 146 (f); See also Dinstein, The Conduct of Hostilities, *supra* note 86, at 106 (concluding that the sinking of neutral merchant vessels without warning is unlawful).

760 See Oppenheim, *supra* note 86, at 856 ("the purpose of ascertaining whether these vessels really belong to the merchant marine of neutrals, and, if this is found to be the case, whether they are attempting to break blockade, or are carrying contraband, or rendering unneutral service to the enemy. […] its *raison d'être* is so obvious that it has long been universally recognized in practice. It is indeed the only means by which belligerents are able to ascertain whether neutral merchantmen intend to bring assistance to the enemy and to render him unneutral service.").

761 *San Remo Manual*, *supra* note 110, at art. 67.

762 R.W. Tucker, The Law of War and Neutrality at Sea 336 (1955); See also Colombos, The International Law of the Sea, *supra* note 94, at 768, para. 884.

Public International Law notes in respect of resisting capture during the enforcement of a blockade:

> 'Clear resistance' presupposes that they act in a manner that has, or may have, an impeding or similar effect on the intercepting forces. Therefore, a mere change of course in order to escape is not sufficient. An act of clear resistance against interception or capture is considered to be an effective contribution to enemy military action by purpose or use.[763]

Once the threshold of "clear resistance" has been reached, the ship may be attacked lawfully. An attack under international humanitarian law "means acts of violence against the adversary, whether in offence or in defence."[764]

177. Under international humanitarian law, only military objectives, combatants and civilians directly participating in hostilities may be attacked. The definition of "military objective" is set forth in Additional Protocol I, article 52.2:

> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[765]

This definition is generally deemed reflective of customary international humanitarian law. In the context of a blockade, vessels breaching the blockade and resisting capture qualify as military objectives by virtue of the fact that their "use" makes an effective contribution to military action, since using these vessels to breach the blockade renders it ineffective.[766] That a vessel breaching a blockade is a military objective can also be derived from the *San Remo Manual*, which states that merchant vessels that are believed on reasonable grounds to be breaching a blockade and that, after prior warning, clearly resist capture may be attacked,[767] because only when an object satisfies the military objective criteria, may it be "attacked."

The resistance offered by persons on board the *Mavi Marmara* (even before the attempt to fast-rope a boarding team onto the roof) was sufficient to have allowed the Israeli Commander to conclude that the

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763 *Heintschel von Heinegg, EPIL*, *supra* note 91, at para. 47.
764 *Additional Protocol I*, *supra* note 292, at art. 49(1).
765 *Id.*, at art. 52(2).
766 *Heintschel von Heinegg, EPIL*, *supra* note 91, at para. 47.
767 *San Remo Manual*, *supra* note 110, at art. 98.

ship was clearly resisting capture, thereby making it a military objective. As a result, pursuant to international humanitarian law, that vessel could have been attacked. Nevertheless, the Commission is of the view that the Israeli forces did *not* attack the flotilla vessels. In other words; they did not use force or "violence" against the *ships*. Their efforts were focused exclusively on capturing the ships and diverting them from their destination.

178. The next issue to be determined is whether the means that Israel used to perform the capture of the flotilla vessels were in accordance with the law. The options available to State authorities seeking to stop a vessel at sea are in fact quite limited. The practical challenges are not unique to armed conflict. Operations to stop merchant vessels at sea are carried out on a regular basis, often by State naval forces engaged in law enforcement (i.e., counter-drug operations, fisheries patrols, customs, immigration) or those acting to prevent the proliferation of weapons of mass destruction (e.g., in accordance with the Proliferation Security Initiative (PSI)). [768]

179. In a law enforcement context, the distinction between a "capture" and an "attack" is not made, since an "attack" is not contemplated within that framework. Nonetheless, the tactics applied in the law enforcement context to stop a vessel serve as a relevant comparison to the attempt to capture a vessel while enforcing a blockade during an armed conflict with respect to the issue of the appropriate escalation of force. The obligation under international humanitarian law to attempt to capture a neutral vessel before attacking it when enforcing a blockade is based on the principle of using force only when necessary. This principle is also applicable in a law enforcement context, where the necessity for using force must be demonstrated by establishing that less forceful means were attempted and failed, or that such means would have been impossible or futile under the circumstances.[769]

Typically, the escalation of the use of force during a law enforcement operation commences with identifying a ship and its intentions, progresses to the firing of warning shots, and then, as a last resort, possibly using disabling fire.[770] The required sequence of measures before resorting to the use of force begins with identifying the enforcing vessel and making its intentions clear by giving a visual or auditory signal to stop.[771] The

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768 Allen, *Limits on the Use of Force*, *supra* note 337, at 105-106.

769 *Id.*, at 99-100; See also D.P. O'Connell, The Influence of Law on Sea Power 65 (1975).

770 Allen, *Limits on the Use of Force*, *supra* note 337, at 100.

771 *Id.*, at 99-100. In respect of the Gaza flotilla, the Israeli authorities identified their vessels as enforcing the blockade to the flotilla vessels, and they provided the flotilla vessels with

US Navy MIO Doctrine provides for the use of "non-violent" signals and maneuvers as a first step before resorting to force.[772]

The next step in the appropriate level of force against a non-compliant vessel includes "deterrence" or warning measures, such as firing warning shots.[773] The objective of warning shots is to provide a clear signal to the decision-makers on board the offending ship that there is an intention to exert force if the ship does not stop. A relevant example in this context is the American case, *Lewin v. U.S.*,[774] in which the US Coast Guard had used firearms and unintentionally killed a crew member on the suspect ship. A different crew member forcefully resisted the takeover of the ship and, in the subsequent proceedings against him, he claimed that his use of force was justified since no warning shots had been fired. The court ruled that even though no warning shots had been fired, the defendant was well aware of the fact that there was a pursuit of the ship with the intention of stopping it by force, which was sufficient to render the defendant's use of force unjustified.[775]

After the use of "deterrence" measures, the next level includes a "show of force", such as disabling fire, which means employing firearms to stop the ship without using force against the passengers themselves.[776] The appropriateness of using disabling fire depends upon the nature of the enforcement action being undertaken. For instance, it has been suggested that disabling fire is lawful in a PSI context because of the importance to counter the proliferation of weapons of mass destruction,[777] and it is certainly contemplated in the context of Maritime Interdiction Operations (MIO) to, *inter alia*, enforce UN Security Council resolutions.[778]

180. The use of disabling fire is indeed an option when enforcing a blockade during an armed conflict, particularly in light of the fact

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the required information about the Israeli intentions to prevent the flotilla vessels from breaching the blockade.

772 *Id.*, at 99-100.

773 *Id.*, at 100.

774 Lewin v. U.S., 62 F. 2d 619 (1933).

775 As stated previously, Israeli authorities had made their intentions to halt the flotilla vessels clear to the captains of the vessels. Since the Israeli armed forces did not intend to use force against the vessels themselves, which will be further elaborated upon below, there was no requirement to issue warning signals before the boarding.

776 Allen, *Limits on the Use of Force*, *supra* note 337, at 100.

777 *Id.*, at 110-111.

778 For a definition of MIO see op. cit. See Wolff Heintschel von Heinegg, *Maritime Interception/ Interdiction Operations in* The Handbook of International Law of Military Operations, 393, para. 20.12 (2010) (where the sequence is outlined a shot being fired, but not in the direction of the ship; a second warning shot across the bow; and finally a shot into the rudder).

that resistance to capture renders a vessel a military objective. The use of disabling fire in this context would constitute an "attack" under international humanitarian law.[779] At the same time, however, its use would have been both lawful and a reasonable escalation in force, prior to considering an attack that could sink the vessel.[780]

The evidence brought before the Commission demonstrates that, throughout the planning process, it was clear to those planning the operation that violence would not be used against the flotilla vessels, i.e., the actual ships themselves. From the evidence, it appears that among the factors that weighed heavily on those who planned the operation against the use of force was the presence of over 500 civilians on board the *Mavi Marmara* and a significant number of civilians on the remaining ships.[781] Potential collateral casualties and damage had to be factored into the consideration. Furthermore, the use of disabling fire would not necessarily have been effective under the circumstances, because "the typical merchant ship is often able to survive even prolonged disabling fire by the weapons and ammunition allowed by the use of force doctrines."[782]

181. While the Israeli authorities used less force than would have been permissible under international law, another issue, which has been the subject of considerable debate in the media and elsewhere, is whether they should have used intermediate levels of force. One question is whether they should have chosen to use water cannons or similar devices to either cause the vessel to "heave to" or to create a "sterile" environment on the top decks of the *Mavi Marmara,* which would have permitted the Israeli navy commandoes to board or land on the ship without being threatened by any of its passengers. While these suggestions are attractive in theory, the reality is that the technical ability to compel a fleeing vessel to stop is exceedingly limited. As noted in one study of the use of force in a maritime environment:

> A variety of low-level force tactics … have been tried over the years, including low level passes by aircraft; physically blocking or even "shouldering" the fleeing vessel; directing fire hose streams into the fleeing vessel's exhaust stack to flood the engine;

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779 *Additional Protocol I*, *supra* note 292, at art. 49(1).

780 Allen, *Limits on the Use of Force*, *supra* note 337, at 104 ("Disabling fire" refers to use of weapons to disable the ship without risk to the crew).

781 The protection of a passenger vessel is reflected in *San Remo Manual*, *supra* note 110, at Rule 152, which prohibits the destruction of captured neutral passenger vessels carrying civilian passengers at sea.

782 Allen, *Limits on the Use of Force*, *supra* note 337, at 105.

deploying nets, lines and other devices designed to entangle the vessel's propellers; and severing the vessel's fuel line.[783]

These tactics have enjoyed only limited success and often pose considerable danger to the ship, the crew, and any passengers on board.[784] The Israeli navy had already experienced an incident in December 2009 where significant damage was caused when a warship collided with a relatively small yacht that was seeking to breach the Gaza blockade.[785] The large size of the *Mavi Marmara* and a number of the other flotilla vessels made "shouldering" (i.e., brushing up against the side of the ship) of those vessels impractical and also very dangerous for Israeli forces.

182. The tactics employed to intercept and board the vessel by the Israeli authorities was to fast-rope soldiers from helicopters down to the roof of the *Mavi Marmara* combined with an attempt to board from Morena speedboats. The decision to try to capture the vessels by fast-roping from helicopters was influenced by the degree of resistance anticipated from the subject vessel. Special Forces trained teams are often used when a boarding is anticipated to be "opposed" or "non-compliant."[786] The Shayeyet 13, an Israeli naval commando force, is trained in vertical envelopment from helicopters and was thus able to perform the difficult operation.

These tactics can be compared to those employed by Coalition naval forces conducting MIO during the Gulf War against Iraq in 1990-1991. It became evident during the course of those operations that large merchant vessels were very difficult to disable without recourse to large caliber weapons with the accompanying risk of casualties; a potential need for a search and rescue operation; and the risk of environmental damage due to the release of oil into the waters. In that situation, other tactics, such as "shouldering" a large merchant vessel, were not practically feasible for

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783 *Id.*, at 101.

784 Transcript of session no. 13 "Testimony of the Chief of Staff, open door" (Oct. 24, 2010), at 14 [hereinafter *Chief of Staff's Open Door Testimony of 24.10.2010*].

785 *MAG Position Paper*, *supra* note 1, at 40.

786 See Rules of Engagement Handbook, International Institute of Humanitarian Law, Annex D, 81, 84 (Nov. 2009) [hereinafter *The ROE Handbook*] *available at* www.usnwc.edu/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook (there are three types of boardings in established maritime doctrine: "opposed boarding" a boarding where the master or crew has made it clear that steps will be taken to prevent the boarding; "non-compliant boarding" a boarding where agreement to board has not been obtained; and "compliant boarding" a boarding where the master and crew of the vessel cooperate).

thin-skinned warships and they raised the possibility of rendering the target vessel a risk to navigation.[787] As a result:

> The tactic adopted … was to surround a recalcitrant ship with a number of coalition warships. If these could not compel obedience by radio, voice calls, or warning fire, a coordinated assault was conducted by specially trained forces lowered from one or more helicopters, with other helicopters providing surveillance and potential covering fire. Once control was established, naval boarding parties conducted physical searches of ships, cargoes, and documentation.[788]

This technique was also deployed in what is perhaps one of the best known Weapons of Mass Destruction (WMD) boardings; the 2002 interdiction of the M/V So San by Spanish naval forces. During that operation, a helicopter-borne Special Operations force boarding team was ultimately deployed to stop the vessel. This is an area where the tactics are well established and understood by naval forces.[789]

Consequently, the decision to have the Shayeyet 13 board the *Mavi Marmara* and the other flotilla vessels by helicopter and from Morena speedboats was fully consistent with established naval practice, whether enforcing a blockade or carrying out maritime law enforcement.

183. In conclusion, the Commission has found that the flotilla vessels were attempting to breach the blockade and Israeli armed forces were therefore justified in capturing them in order to enforce the blockade. By clearly resisting capture, the *Mavi Marmara* had become a military objective. After prior warning, the Israeli forces could have considered using disabling fire against that ship. However, if that option or any other option that involved the use of armed force against the ship had been employed, it would have caused a significant risk of harm to the passengers aboard the ship (under international humanitarian law; "collateral damage"). Therefore, the option of fast-roping naval commandoes onto the *Mavi Marmara* represented an internationally recognized means by which to minimize the potential for civilian casualties or damage to civilian objects that could have occurred if armed force had been used against the ship itself. It remains unclear whether the majority of the passengers on the vessels understood the limited options available to the Israeli military forces when enforcing the blockade, and the risk that the

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787 See James Goldrick, *Maritime Sanctions Enforcement Against Iraq*, *in* Naval Blockades and Seapower, *supra* note 87, at 203-204.

788 *Id.*, at 204.

789 Allen, *Limits on the Use of Force*, *supra* note 337, at 105-106.

Flotilla organizers were exposing them all to by attempting to breach the blockade.

In light of this conclusion, the analysis will now turn to the use of force against persons on board the flotilla vessels.

Law Applicable to the Use of Force against Persons on Board the Flotilla Vessels

Application of International Humanitarian Law or Human Rights Law

184. In the context of an armed conflict, a key issue is what principles govern the use of force against civilians: international humanitarian law or human rights law? As has been noted by the International Court of Justice in the *Wall* case, the interface between these two normative regimes is intricate: "[T]here are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[790]

185. As discussed in chapter A of this report, there is considerable ongoing debate about the interface between international humanitarian law and human rights law.[791] However, often lost in the dialogue regarding the applicable framework is the fact that humanitarian law reflects many of the norms that are also recognized as being part of human rights law.[792] This is evident when considering, for instance, the individual right of self-defense. Military and civilian personnel have the right to protect their own lives, whether they are operating in an armed conflict or in peacetime.[793] In addition, military forces have always had to

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790 *The Wall* Case, *supra* note 130, at 178, para. 106.

791 See, e.g., David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?* 16 Eur. J. Int'l. L. 171 (2005); Francoise J. Hampson, *The Relationship Between International Humanitarian Law And Human Rights Law From The Perspective Of A Human Rights Treaty Body*, 90 Int'l Rev. Red Cross 549 (2008); Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Al Bassiouni v. The Prime Minister of Israel*, 37 Isr. L. Rev. 101 (2009); Yuval Shany & Orna Ben-Naftali, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Isr. L. Rev. 17 (2003-04) (supporting the application of human rights to all acts of States, even outside their own territories, and towards individuals that are not their citizens).

792 See, e.g., *Additional Protocol I*, *supra* note 292, at art. 75 (outlining fundamental rights available to persons who are in the power of a Party to the conflict. These rights found under international humanitarian law reflect human rights "norms"; See also *Hamdan v. Rumsfeld*, *supra* note 137, at 71 (where a plurality of the United States Supreme Court held this provision was customary international law)).

793 See Prosecutor v. Dario Kordic, Mario Cerkez, Case No. IT-95-14/2-T, Judgment, para. 451

deal with civilians, including during the policing of occupied territories when carrying out their international humanitarian law responsibilities to maintain public order and safety.[794]

186. Although there are schools of thought that largely favor extensive applicability of human rights law, this approach is not universally accepted.[795] For example, neither Israel nor the United States agrees with a broad extra-territorial application of human rights law.[796] The issue of whether, or the degree to which, there is extra-territorial application of human rights law is particularly relevant to the enforcement of the Gaza

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(Feb. 26, 2001) (noting that the principle of self-defence enshrined in the ICC Statute, at art. 31(1)(c) "reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law"); Further, the right to self-defense is reflected in Geneva Convention I, at art. 22 (1) regarding the arming of medical personnel and art. 22(2) for armed pickets, sentries or escorts at medical units or establishments; See also AP I, at art. 65(1) (regarding the arming for self-defense of civilian civil defence personnel); art. 67. (regarding members of the armed forces and military units assigned to civil defence organizations); and *The UK Manual*, *supra* note 113, at 40, para. 4.3.7 (indicating that civilians accompanying a military forces "should be issued with small arms for self-defence purposes only").

794 See, e.g., 1907 Hague Regulations, Art. 43 (providing that the occupying power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [civil life], while respecting, unless absolutely prevented, the laws in force in the country." The reference to "civil life" comes from the official French version, which has been suggested was incorrectly phrased as "safety" in the first English translation); See also Eyal Benvenisti, The International Law of Occupation 10-11 (2004).

795 See, e.g., Lubell, Extraterritorial Use of Force, *supra* note 149, at 193-235 (2010) (for an analysis favoring the universal application of human rights law). To the extent the notion of universal application of the International Covenant on Civil and Political Rights is based on interpretations of the Human Rights Commission, including its *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev. 1/Add.13 (2004), care must be taken in viewing such interpretations as "law". See also *Amnesty International v. Chief of the Defense Staff for the Canadian Forces* T-324-07 Fed. Ct. TD. para. 239 (2008) ("Insofar as the commentaries of the United Nations Committees are concerned, as the respondents observed, these are recommendations made by groups with advocacy responsibilities. While they clearly reflect the views of knowledgeable individuals, they do not reflect the current state of international law, but more the direction that those groups believe the law should take in the future").

796 Lubell, Extraterritorial Use of Force, *supra* note 149, at 197-198 (discussing the United States position). For the official Israeli position, see, e.g., Israel Ministry of Foreign Affairs, *Legal Advisor of the Israel Ministry of Foreign Affairs on the Applicability of the ICCPR to the Current Situation in the West Bank and Gaza Strip, Response of Mr. Alan Baker, Legal Advisor of the Israel Ministry of Foreign Affairs, On the Applicability of the ICCPR to the Current Situation in the West Bank and Gaza Strip* (May 15, 1998) *available at* www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/7/Legal+Advisor+of+the+Israel+Ministry+of+Foreign+Af.htm; See also Francoise J. Hampson, *The Relationship*, *supra* note 791, at 550; Michael Dennis, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 Am. J. Int'l. L. 119 (2005).

naval blockade on May 31, 2010, since it took place on the high seas, outside the territory of the Israeli State.

Recently, the European Court of Human Rights ruled in the *Case of Medvedyev and Others v. France*[797] that the interception of a vessel on the high seas by a French warship in a counter-drug law enforcement operation did engage human rights jurisdiction after "full and exclusive control" over the ship had been established. However, the judgment does not clarify exactly when the French armed forces were considered to have obtained "full and exclusive control" of the ship, especially since the litigation did not center on the boarding and overtaking of the ship, but rather on the arrest and confinement of the crew to their cabins for a period of 13 days during the transit to France.

In the case at hand, it is difficult to see how Israel could be considered to have had "full and exclusive control" prior to taking control of the bridge of the flotilla vessels and the subsequent cessation of resistance. Further, even if Israeli forces were considered to have had such control over the *Mavi Marmara* prior to taking control of the bridge, the actions of the Israeli forces would still be governed by the *lex specialis* of international humanitarian law since the enforcement of a blockade is not a law enforcement mission. Therefore, the ruling of the European Court of Human Rights in the *Medvedyev* case is of limited assistance in resolving the issue of extra-territorial application of human rights law during the enforcement of the Gaza blockade.

187. With respect to the enforcement of the blockade, the use of force is to be interpreted under the international humanitarian law framework,[798] which permits attacks against combatants and civilians taking a direct part in hostilities. International humanitarian law is guided by the principle of distinction, which is an obligation to distinguish at all times between civilians and combatants. A civilian is any person who is not defined as a "combatant."[799] Civilians enjoy a general protection against the dangers arising from military operations.[800] Hence, when attacking a military objective, the attacking party must take all feasible precautions to avoid incidental (collateral) injury and death to civilians.[801] Further, the expected incidental harm caused to civilians by an attack must not

797 Medvedyev and Others v. France, Application No. 394-03, Eur. Ct. H.R., Gr. Ch., Judgment, para. 63-67 (Mar. 29, 2010).

798 See *Nuclear Weapons Case*, *supra* note 365, at para. 25.

799 *Geneva Convention III*, *supra* note 48, at art. 4(A)(1), (2), (3) and (6); *Additional Protocol I*, *supra* note 292, at art. 43; See also the *Targeted Killing* case, *supra* note 37, at para. 24.

800 *Additional Protocol I*, *supra* note 292, at art. 51(1).

801 *Id.*, *supra* note 292, at art. 57(2)(a)(ii).

be excessive in relation to the concrete and direct military advantage anticipated (the "principle of proportionality").[802] Civilians shall not be the object of an attack unless, and for such time as they take a direct part in hostilities.[803] Regarding the use of force, international humanitarian law treats combatants and civilians who take a direct part in hostilities differently than uninvolved civilians.

Under international humanitarian law, the right to life is protected by prohibitions against indiscriminate attacks,[804] targeting individual civilians and the civilian population unless they take a direct part in hostilities,[805] causing superfluous or unnecessary suffering to combatants,[806] and targeting those who are *hors de combat*.[807]

188. As a result, the applicable rules regarding the use of force against persons on board the flotilla vessels are thus primarily governed by their "status" under international humanitarian law. The salient issue is whether the passengers were civilians taking a direct part in hostilities or uninvolved civilians. The distinction is significant for three main reasons. First, as stated above, civilians who are not taking a direct part in hostilities cannot be the object of an attack, whereas direct participants can be attacked for such time they are taking part in hostilities.

Second, under international humanitarian law, the flotilla vessels became valid military objectives once they resisted capture. However, the presence of civilians on board the vessels is relevant to the assessment of the principle of "proportionality" discussed above. For instance, had the *Mavi Marmara* been "attacked," Israeli forces would have had to assess whether the expected incidental loss of civilian life or injury to civilians would be excessive in relation to the concrete and direct military advantage anticipated by the attack.[808] Direct participants in hostilities, however, would not be considered civilians for the purpose of assessing the proportionality of the action.

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802 *Id.*, *supra* note 292, at art. 57(2) (iii).
803 *Id.*, *supra* note 292, at art 51(3).
804 *Id.*, *supra* note 292, at art. 51(4).
805 *Id.*, *supra* note 292, at art. 51(3).
806 *Id.*, *supra* note 292, at art. 35.
807 *Id.*, *supra* note 292, at art. 41; *Additional protocol I* provides that a person is hors de combat if:
"(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
provided that in any of these cases he abstains from any hostile act and does not attempt to escape".
808 *Id.*, *supra* note 292, at art. 57(2).

Third, there are particular norms that apply when force is directed at civilians who are not taking a direct part in hostilities. Generally, such force is governed by the principles of "necessity" and "proportionality." The principle of "necessity" requires that force must be necessary in order to enforce the law or perform some other lawful act. The principle of "proportionality" has a different meaning regarding the use of force against civilians than it has, as explained above, when applied to the targeting of military objectives under international humanitarian law. In the *Targeted Killing* case, the Israeli Supreme Court relied on the following excerpt from a European human rights case to explain the test for assessing when the use of lethal force by Israeli forces is disproportionate:

> [T]he use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk.[809]

189. In a law enforcement context (which applies human rights norms), the use of lethal force by state agents is generally permitted in three circumstances: self-defense, defense of others, and enforcement of the law. There are basic principles that guide the use of force to ensure that it is necessary and proportionate: (i) application of non-violent means before resorting to the use of force and firearms; (ii) use of force and firearms only if other means are ineffective or without promise of achieving the intended result; (iii) use of warnings before using firearms unless it places personnel at risk or is inappropriate or pointless in the circumstances; (iv) intentional lethal use of firearms only when strictly unavoidable to protect life; (v) providing law enforcement personnel with self-defense equipment; and (vi) use of less-lethal incapacitating weapons to restrain

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809 *Targeted Killing case, supra* note 37, at para. 40 (quoting *McCann v. United Kingdom*, Application No. 18984/91, Eur. Com. H.R., Report of the Commission (Sep. 27, 1995), at para. 235 [hereinafter *The McCann* case] (it should be noted that the quote can be found in the European Commission of Human Rights' Report, even though the Israeli Supreme Court indicates it was from the European Court of Human Rights)). The Israeli Supreme Court referred to this statement while assessing the use of force against direct participants in hostilities in the *Targeted Killing* case, *supra* note 37, at para. 40; However, it should be noted that this reasoning, which incorporates human rights law into international humanitarian law, does not reflect the more widely accepted interpretation of international humanitarian law. In any event, in the case at hand, the Israeli Supreme Court's reasoning would not be applicable when assessing the use of force against direct participants in hostilities given that is not clear to what extent the court believed the obligation to capture rather than kill a civilian taking a direct part in hostilities applied to the use of lethal force outside the narrow field of targeted killing, or whether it was restricted to the uniquely high levels of control inherent in being an occupying power. These are cogent reasons for restricting its application to the specific security scenario presented in that case.

the use of deadly force.[810] Further, the use of firearms is permitted in self-defense or the defense of others against the imminent threat of death or serious injury; to prevent a particularly serious crime involving grave threat to life; to arrest a person presenting such a danger and resisting their authority; or to prevent his or her escape.[811]

Any use of force against civilians who are *not* taking a direct part in hostilities, is guided by the principles of "necessity" and use of "proportionate force" associated with human rights-based law enforcement norms.

To determine the applicable norms governing the use of force in the matter before the Commission, therefore, it is first necessary to assess the status of the persons aboard the flotilla vessels pursuant to the principles of international humanitarian law. The status of the following three groups will be considered separately: (i) the civilian passengers, (ii) the IHH-controlled activists who partook in the violence on board the *Mavi Marmara*,[812] and (iii) the captain and crew of the *Mavi Marmara*.

The Status of the Civilian Passengers

190. As discussed above, the participants in the Gaza flotilla were predominantly an international group of activists whose primary goal appeared to be to bring publicity to the humanitarian situation in Gaza by breaching the blockade imposed by Israel. On board the *Mavi Marmara*, a majority of the passengers appear not to have been controlled by, or acting on behalf of, the IHH, which, as will be discussed below, had a significantly different goal in mind. The disparity between these two groups (the flotilla participants and the IHH activists) was evident both due to a physical separation between the two groups and by their actions. Perhaps the clearest example is the behavior of the two respective groups as soon as the Israeli Navy commenced its capture of the vessel. At that point, an order was given over the loud speaker that the passengers should return to their seats below deck.[813] One group, by far the largest, knew to

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810 See The United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,* Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, *available at* www2.ohchr.org/english/law/firearms.htm [hereafter: *U.N. Basic Principles*].

811 *Id.*, at prov. 9.

812 As necessary, these categorizations will be applied to the other vessels in the flotilla in the analysis of the use of force.

813 Mr. Muhamad Zidan and Sheikh Hamed Abu-Debs testified before the Commission that the person who gave the order was the Captain of the Mavi Marmara; Transcript of session no. 15 "Testimony of Mr. Muhamad Zidan" (Oct. 25, 2010), at 7; Transcript of session no. 15 "Testimony of Sheikh Hamed Abu-Debs " (Oct. 25, 2010), at 5.

go below decks and did not participate in the violent opposing of the boarding. The other group, organized and controlled by the IHH, stayed on the upper decks and prepared to confront the Israeli forces. Further, from the testimonies of the three soldiers who were taken below deck by the IHH activists, it is evident that there was a clear distinction between the two groups. As opposed to the violent IHH activists who brought the soldiers below deck, where they beat them and prevented them from receiving adequate medical care, some of the flotilla participants they encountered below deck protected them from abuse by the IHH-directed captors. All of the soldiers who were taken below deck stated that without the intervention of some of the flotilla participants, their situation would have been much worse.[814]

191. Therefore, the Commission concludes that the use of force against civilians who did not take a direct part in the violence on board the *Mavi Marmara* is governed by the principles of necessity and the use of "proportionate force" associated with human rights-based law enforcement norms. We will discuss the implications of this conclusion below.

Status of the IHH Activists

192. On board the *Mavi Marmara*, a distinct group of activists seemed to have a different agenda than the other participants in the Gaza flotilla. The dominant members of this group consisted of a "hard core" of 40 activists in the Turkish organization IHH. It also included other participants, largely of Turkish nationality, that decided, for one reason or another, to participate in the violence on board the *Mavi Marmara.* In this respect, they operated in concert with the hard core of IHH activists. It is the group of activists that resisted the IDF's attempts to capture the *Mavi Marmara* (as mentioned above, the IHH affiliated persons that partook in the violence are referred to in the report as "IHH activists").[815] The actions of these activists after the IDF began to attempt taking over the *Mavi Marmara* (and for some; even before this) show that their status under international humanitarian law was distinct from the other passengers on the ship.

193. Civilians retain the protection that their status grants them under international humanitarian law, as long as they do not take a direct part in hostilities. When they do take such part in hostilities, they can be targeted

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814 Testimony of the commander of Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 4.

815 For more details, see *supra* paras. 126-140 in this report.

in the same manner as if they were combatants. This principle is reflected in article 51(3) to the First Additional Protocol, which states:

> "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities".[816]

The term "take a direct part in hostilities" has been the subject of considerable analysis and discussion. The ICRC Commentaries to Additional Protocol I define direct participation as follows:

> "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked".[817]

194. More recently, in a document entitled *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, the ICRC has suggested three constitutive elements that are cumulatively required for an act to qualify as direct participation: (i) a threshold of harm; (ii) a causal link between that act and the harm likely to result; and (iii) that the act be in support of one party to the conflict and to the detriment of another.[818] However, it should be noted that this document has generated considerable controversy, and the participants were not able to reach a broad consensus regarding the definition of direct participation in hostilities. Therefore, the *Interpretive Guidance on the Notion of Direct Participation in Hostilities* will be used cautiously in this report.[819]

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816 *Additional Protocol I*, *supra* note 292 at art. 51(3).

817 See *ICRC Commentary Additional Protocol I*, *supra* note 285, at art. 51(3), para. 1944.

818 See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 46 (Nils Melzer ed., 2009), *available at* www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf [hereinafter ICRC *Interpretive Guidance*]:
"In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:
1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)".

819 In 2003, the ICRC and the Asser Institute commenced a project to provide interpretive guidance on the concept of direct participation in hostilities (i.e. ICRC *Interpretive Guidance*, *supra* note 818) Various critiques of the *Interpretive Guidance* can be found at the NYU J. INT'L L & P forum, *available at* www.nyujilp.com/2010/06/05/new-issue-forum-on-direct-participation-in-hostilities; Further, *The Air and Missile Warfare Manual*,

195. The Supreme Court has ruled on the issue of direct participation in hostilities in 2005 in the *Targeted Killings* case. In this report, the Commission has chosen to rely primarily on this ruling when assessing direct participation in hostilities. The court provided that, although Israel had not enacted Additional Protocol I, its provisions relating to direct participation nonetheless are applicable to Israel as part of customary international law.[820] The judgment concludes that article 51(3) of Additional Protocol I encompasses three main parts: *first*, the concept of "hostilities"; *second*, the requirement that civilians take a "direct" part in hostilities; and *third*, the provision by which civilians are not protected from attack "for such time" as they take direct part in hostilities.[821] In relying on the ICRC Commentaries to the Additional Protocols, the court stated:

According to the accepted definition, a civilian is taking part in hostilities when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for the hostilities. Regarding taking part in hostilities, there is no condition that the civilian use his weapon, nor is there a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all.[822]

The court further noted that since there is no consensus on what "direct" participation entails, that standard must be assessed on a "case by case" basis. However, it concluded that a civilian who generally supports the hostilities is not taking a direct part, while "a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it, is a civilian taking "an active part" in the hostilities…."[823] Regarding the interval between these two examples of indirect and direct participation, the court emphasized that the decisive factor is whether the individual is performing the functions of a combatant.[824] Finally, with regards to "for such time", the court was of the view that there was a lack of clarity as to

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supra note 115, at 121, para. 5, notes that the criteria established in the DPH Study were not unanimously accepted by the participants in that Study. The lack of international consensus on this document is reflected in the May 2010 Human Rights Council *Report Of The Special Rapporteur On Extrajudicial, Summary Or Arbitrary Executions, Study On Targeted Killings*, A/HRC/14/24/Add.6, at 20, para. 62, which states: "In 2009, the ICRC issued its Interpretive Guidance on DPH, *which provides a useful starting point for discussion* [emphasis added]."

820 See *Targeted Killing* case, *supra* note 37, at para. 30.

821 *Id.*, at para. 32.

822 *Id.*, at para. 33.

823 *Id.*, at para. 34.

824 *Id.* at para. 35; See also Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int'l. 17 (2004).

the scope of the provision "for such time" in international law,[825] although it provided that if "such time" has passed, the protection granted to a civilian returns.[826]

In determining whether any of the persons on board the *Mavi Marmara* should be considered direct participants in hostilities, the Commission is thus mindful that the existing criteria lack a degree of precision and are controversial. As the Israeli Supreme Court has stated, in the case of doubt, the status of an individual should be that of a civilian.[827]

196. As previously stated, from the materials before the Commission, including oral testimonies, documentary and magnetic media, it appears that the violence that the Israeli forces encountered when seeking to capture the *Mavi Marmara* was organized and planned. This is evident by the actions of the IHH activists as detailed above, including the following facts: a core group of some 40 IHH activists boarded the *Mavi Marmara* in Istanbul without going through a security check; some of the members of this group identified themselves during the journey with specific signs on their clothing, such as "Security Guard"; a large number of bullet proof ceramic vests, gas masks, telescopic sights, and night-vision aids were found on board the *Mavi Marmara*;[828] the IHH activists established a communications structure through the use of handheld radios (which were also given to the crew but with a different frequency);[829] a few hours before the boarding and after the captain on the *Mavi Marmara* had been warned by the IDF, an order went out to all passengers to return to their seats below deck - some passengers, however, remained on the upper decks; and some of those passengers used disk saws to cut the ship's metal railings and prepare iron bars; IHH activists were divided into groups and stationed for duty at specific posts around the ship.[830] Other passengers, who were primarily of Turkish nationality, joined this core group in resisting the Israeli attempts to board the ship. It is evident that the IHH organized and planned for a violent confrontation with the Israeli military forces.

From the IDF's *infra red* (a visual recording device) it seems that when the takeover started, some approximately 100 IHH activists were

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825 *Targeted Killing* affair, *supra* note 37, at para. 40.
826 *Id.*, at para. 38.
827 *Id.*, at para. 40.
828 Testimony of commander of the Takeover Force, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 4.
829 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 29.
830 See the video file "VIDEO_100530_003.asf", in folder *Sea*, *Navy Data Disc*, *supra* note 5; See also the video file "VTS_01_2.mov", in folder *Air*, *Id*.

located on the upper decks of the ship. The coordinated manner in which the IHH activists met the Israeli soldiers individually fast-roping to the deck (for some of them, even before they reached the deck), indicates a clear intent to violently oppose a capture of the ship. IDF soldiers on the Morena speedboats were attacked with iron bars, chairs, bolts, and other objects as they approached the *Mavi Marmara*. Further, three soldiers were thrown off the roof to a lower deck where they were stripped of their equipment, sustained severe injuries and were dragged to a location below deck. Several other soldiers testified that attempts were made to throw them over to the lower decks as well.[831] This concerted effort on the roof to throw soldiers to other IHH activists that were waiting on the deck below, taken together with the fact that all three captured soldiers were taken to the same location below decks, points to the existence of a plan to capture Israeli soldiers and possibly hold them as hostages (as happened in a different event that the IHH was involved in about six months prior to this event, when seven Egyptian soldiers were kidnapped by the organization's activists).

197. The level of violence on board the *Mavi Marmara* cannot be categorized as civil disobedience. There was nothing passive regarding the resistance carried out by the IHH activists.[832] Neither were they part of a "criminal gang" or a group of rioters.[833] The violence was specifically directed at the IDF soldiers and was clearly intended to harm them. The manner in which a number of the IHH activists pressed home their attacks even after the Israeli forces started to use lethal force in self-defense reflects a strong commitment to engage in conflict. Some of those activists also expressed their wish to be "*Shaheeds*."[834] Setting aside the question of whether some of their proclamations may have been demonstrative in nature, it was evident from the testimony of a number of soldiers that the IHH activists they encountered were using violence with the specific intent to prevent the Israeli forces from boarding the *Mavi Marmara*. The Israeli forces were expecting a low level of resistance from the passengers on board the flotilla vessels, but what they experienced on the *Mavi*

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831 Testimony of soldier no. 11, *IDF Completion Response of 7.11.2010*, *supra* note 486; Testimony of soldier no. 22, *Id*. and Testimony of soldier no. 24, *Id*.

832 Passive resistance is defined in the Oxford Online Dictionary as "non-violent opposition to authority, especially a refusal to cooperate with legal requirements", *available at* oxforddictionaries.com/view/entry/m_en_gb0608850#m_en_gb0608850.

833 See ICRC *Interpretive Guidance*, *supra* note 818, at 24 (which suggests "[l]astly, it should be pointed out that organized armed violence failing to qualify as an international or non-international armed conflict remains an issue of law enforcement, whether the perpetrators are viewed as rioters, terrorists, pirates, gangsters, hostage-takers or other organized criminals").

834 See the doctor's testimony, Inquiry Exansion of 20.9.2010, supra note 451, at 2.

Marmara, were levels of violence that they associated with "combat." The weapons used by the IHH activists offered lethal force and resulted in significant injuries to Israeli soldiers. It seems that if it were not for the protective equipment worn by Israeli military personnel and their use of both non-lethal and lethal force in self-defense, the injuries sustained by both soldiers and IHH activists would have been even worse and more widespread.

198. It should also be noted that breaching the blockade could have adversely affected the IDF's military operations in that establishing that the blockade was not effective, thus jeopardizing the security and political goals for which the blockade was established. Consequently, breaching the blockade, in and of itself, constitutes a potential harm to Israel's military effort. Further, the IHH activists attempted to carry out their plan by using force against the soldiers of one of the parties to the conflict. The IHH activists acted directly to cause, or attempt to cause, this harm to one side to the armed conflict, i.e. Israel. However, it should be noted that the other flotilla participants, who did not actively participate in the violence on board the *Mavi Marmara*, are not considered to have taken a direct part in hostilities based on their participation in the attempted breach of the blockade alone.

In addition, the materials before the Commission show that there was also a nexus between the actions of the IHH activists and the conflict. While the flotilla was self-described as a "humanitarian mission," that title masked an, in part, different objective. This is evident from the fact that the flotilla organizers did not attempt to reach an agreement with Israel regarding the delivery of humanitarian supplies. Those controlling the flotilla specifically refused the Israeli offer to divert the vessels to Ashdod and have their supplies forwarded over land to Gaza. On the other hand, however, the arrival of the flotilla was planned and coordinated in advance with the Hamas. As stated above, from the evidence before the Commission, it appears that the IHH aided the Ministry of Transportation and the Ministry of Public Works of the Hamas government in preparing the fishing port in the Gaza Strip to receive the flotilla vessels.[835] Further, while referred to as a humanitarian mission, the flotilla was carrying cement, a commodity that Israel has identified as being used by the Hamas for military purposes and that the transfer of which to the Gaza Strip was restricted by Israel.

199. In sum, the IHH activists' resistance to the boarding of the *Mavi Marmara* was planned and extremely violent. Further, it was directly

835 IICC report (Apr. 7, 2010), *supra* note 83.

connected to the ongoing international armed conflict between Israel and the Hamas. The obstruction of the Israeli attempts to enforce the blockade and the levels of violence offered by the IHH activists were not representative of acts associated with civil disobedience or isolated or sporadic acts of violence. Under the circumstances, these acts can reasonably be viewed as attempts to privilege the Hamas (acting to the detriment of Israel in its armed conflict with the Hamas) by establishing that the blockade was not effective.

200. It should be noted that suggestions that the IHH activists were acting in legitimate self-defense are not supported by the evidence. First, the blockade was established in accordance with the rules governing blockades and there was no right of self-defense to be exercised by the IHH activists simply because the Israeli military was attempting to enforce the blockade. Second, in seeking to capture and board the ship, the Israeli forces had to respond to the violence offered first by the IHH. This is evident from the magnetic media that shows the extreme levels of violence used against the IDF's soldiers. Such attacks also occurred before the soldiers could reach the roof of the *Mavi Marmara;* as they fast-roped down to the ship, when they were most vulnerable because they had not yet had an opportunity to defend themselves or draw their weapons.

201. Based on the criteria established in the *Targeted Killings* case, the Commission concludes that the IHH activists who participated in violence on the *Mavi Marmara* were direct participants in hostilities. In addition, it should be noted that the Commission would have reached the same conclusion by applying the standards set out in the ICRC *DPH Interpretive Guidance on the Notion of Direct Participation in Hostilities*.

For the purposes of this report, the Commission has assessed that participation in hostilities occurred at least from the time that the passengers were directed to take their positions as the Israeli naval vessels arrived, until the ship was taken under Israeli control. While it is also evident that a number of IHH activists took part in hostilities from a planning and logistical perspective well before the arrival of the Israeli armed forces, for the purposes of this analysis, it is only necessary to find that they were directly participating from the time the IDF's takeover of the ship began.

The finding that the IHH activists were taking a direct part in hostilities is important, because it places their actions in the proper legal context. However, due to the Israeli government's lack of information with regards to the IHH organization and the intentions of the flotilla organizers, the IDF was not aware of that group's plan until the first

Solider fast-roped down towards the roof. During the planning of the Israeli military operation, the possibility that the passengers aboard the vessels might be direct participants in hostilities was not expected and was not taken into account. The Rules of Engagement (ROE), which outlined the authorized levels of force to be used by the Israeli soldiers, reflected that approach. This will be discussed in detail below.

Status of the Captain and Crew

202. Finally, the status of the captain and crew will be examined. Merchant crews have enjoyed a somewhat unique status under international humanitarian law. However, depending upon their actions, the captain and crew of a neutral merchant vessel can be considered to have taken a direct part in hostilities.

203. The captain of the *Mavi Marmara* had a special responsibility to avoid an attempted breach of the blockade. This responsibility is reflected in the constant reference to the "Master" of summoned merchant vessels in foundational texts on the law of naval warfare.[836] The Master of a neutral vessel has a responsibility for the ship and all persons aboard, which includes complying with all belligerent orders; ordering that the ship's crew comply with those orders; and doing everything feasible to ensure that neither the crew nor the passengers interfere with or hamper the exercise of belligerent rights.

In this instance, the captain's actions demonstrated a clear intent to breach the blockade, either under his own volition or under the direction of the IHH.[837] Further, the captain's control of and position on the bridge during the boarding, and the clear refusal to stop the vessel despite repeated warnings, demonstrate that he was not a passive participant in the events on May 31, 2010. In his interrogation in Israel, the captain of the *Mavi Marmara* stated that he changed the course of the ship when directed by Israeli forces.[838] However, from the evidence before the Commission, including footage from the IDF's *infra red* and the analysis of the course based on that footage, it is evident that the captain did not change the

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836 See Colombos, The International Law of the Sea, *supra* note 94, at 765 et seq. paras. 879-883; See also Oppenheim, *Supra* note 86, at 851 et seq.

837 It has been suggested that the captain acted to stop IHH personnel from preparing weapons by cutting the railings of the *Mavi Marmara*; Such steps, assuming they did take place, were obviously ineffective since they did not stop the IHH personnel from amassing those weapons and making preparations for the assault on the Israeli personnel. The captain thus remained responsible for what occurred on the vessel.

838 see article: 03/06/10/825/5092 *Military Intelligence Reports*, *supra* note 491.

course of the ship during the entire event.[839] The soldiers who took over the bridge stated that the captain was the one holding the steering wheel.[840] Furthermore, it also appears that after the IDF soldiers had taken over the *Mavi Marmara*, the captain gave an order to his crew to wreck the engine of the ship.[841] The Israeli armed forces had to bring technical personnel from shore to fix the engine to get the *Mavi Marmara* underway.[842]

The captain's acts point to an integrated role in the IHH efforts to oppose the Israeli boarding of the vessel. As a result, the Commission finds that the captain of the *Mavi Marmara* was an active participant in the attempts to obstruct the Israeli boarding operations and, therefore, he was a direct participant in hostilities. Regarding the crew, the Commission does not have sufficient evidence to establish whether they were active participants, and they will thus be considered to have had a status as civilians who did not take part in the hostilities.

The Rules of Engagement and the Use of Force

204. Having reviewed the status of the flotilla participants, the analysis will now turn to the direction given to the IDF combat personnel regarding the use of force. These directions are called Rules of Engagement (hereafter: the **ROE**).[843] The ROE is a document that in practical terms communicates to the soldiers the applicable legal framework for the use of force during an operation. As reflected in the European Court of Human Rights case *McCann v. The United Kingdom*, a determination of the legality of the use of force during an operation requires an assessment of whether the Rules of Engagement (ROE) were consistent with the law.[844] A key issue, therefore, is whether the ROE issued to the soldiers before the Winds of Heaven 7' operation properly reflected the law that governs the use of force. [845]

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839 Testimony of the aerial look-out, *Inquiry Expansion of 20.9.2010*, *supra* note 451.

840 It should be noted that according to the soldiers' testimonies, the Captain did not resist when the Israeli force took over the bridge, see the testimony of soldier no. 18, commander of the force taking over the bridge, *Id*., at 2.

841 Testimony of soldier no. 9, *Id*., at 2, testified that when taking over the bridge, the soldiers told the Captain to halt the ship, he started to speak in Turkish to his crew. Soldier no. 9 stated that he later found out that what the Captain said to his crew was an order to wreck the engine of the ship.

842 *Id*.

843 It should be noted that the phrase "rules of conduct for the forces" might be more appropriate under the circumstances. However, due to the fact that in our case it is mainly the provisions concerning the use of force that are relevant, especially the use weapons, this report uses the narrower but more familiar expression "rules of engagement."

844 *McCann and others v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R., Judgment (1995), at 156 [hereafter: the *McCann* case].

845 See *The ROE Handbook*, *supra* note 786, Part One: Introduction, 1 at para. 3 ("ROE are

205. During a law enforcement operation, the ROE would normally reflect the authority to use force in self-defense, defense of others, and for mission accomplishment. If the mission is conducted during an armed conflict, where the legal authority to use force is broader, the ROE could reflect rules directly based on international humanitarian law. However, even during armed conflict, the authority to use force may still be more narrowly prescribed in the ROE than what the law permits, either because of operational considerations or due to a need to meet particular policy goals. Therefore, the substance of any ROE is dependent upon both the nature of the mission and the anticipated levels of force required to complete that mission.

206. The ROE issued for the 'Winds of Heaven 7' operation on May 31, 2010, were entitled "the Rules of Conduct." They were set out in Annex G (the legal annex) to the naval command issued by the Israeli Navy operation department (this was also annexed to the land operation command). Under the provision named "General" in the Rules of Conduct, it was provided that when dealing with civilian foreigners who are not, "according to existing information", combatants, force should not be exercised towards those civilians beyond the minimum amount necessary for completion of the mission, i.e., to halt the vessels.[846] The use of force was permitted only as a last resort and only if persuasion was unsuccessful. Further, the authority to use force was limited to two distinct circumstances: to prevent the risk of harm to a person, and to deal with an attempt to thwart the bringing of a vessel to an Israeli port.[847] If force had to be used, it had to be exercised gradually and in proportion to the resistance met, and only after examining alternatives to prevent deterioration of the situation.

Use of less-lethal weapons. The use of less-lethal weapons was permitted only when necessary to neutralize an immediate threat to the safety or life of persons from a specific person. Further, if the person posing the threat could be neutralized without using a less-lethal weapon,

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issued by competent authorities and assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives. ROE appear in a variety of forms in national military doctrines, including execute orders, deployment orders, operational plans, or standing directives. Whatever their form, they provide authorisation for and/or limits on, among other things, the use of force, the positioning and posturing of forces, and the employment of certain specific capabilities. In some nations, ROE have the status of guidance to military forces; in other nations, ROE are lawful commands").

846 *Naval Operational Order 3*, *supra* note 445, annex G, at 59-61.

847 *Id*.

the soldiers were instructed to do so.[848] The ROE also specified that in case force was required, only less-lethal weapons specifically approved for the mission would be used. In this context, it should be noted that the ROE refer to the operation and safety instruction found in Annex D to the naval command, which further restricted the use of less-lethal weapons to certain ranges and limited which parts of the body could be targeted. For example, shooting at the head or back was prohibited due to the risk of lethal harm.

Use of lethal weapons. The ROE provided that generally, the use of live fire is not permitted. The only case in which lethal weapons was permitted was in self defense - to remove a real and imminent danger to life, when the danger cannot be removed by less harmful means.[849] Prior to using lethal weapons, the soldiers had to issue verbal warnings or attempt to subdue the person posing the danger by less harmful means. If that was not possible, the next steps were to threaten the use of weapons; shoot warning shots in the air; and fire towards the legs (at the knees or lower). However, the soldiers could use lethal force without following these steps if necessary to remove an immediate threat. The ROE also stated that medical assistance has to be provided to any person wounded by the use of force during the operation. Once the danger was removed, there must be an attempt to apprehend the person posing a risk without the use of firearms. Further, the infliction of harm to uninvolved persons must be avoided and someone who has surrendered or stopped constituting a threat must not be fired upon.

207. While the operation was being conducted in the context of an armed conflict, the ROE provided an authority to use force that reflected the nature of a law enforcement operation, in which the authority to use force is more limited. In fact, the ROE that were issued for the operation appear to be even more limited than what can sometimes be found in an operational or law enforcement context, because they did not overtly contemplate the use of either lethal or less-lethal force to complete the mission or, as in a law enforcement context, to enforce the law. While the ROE did authorize the use of force to prevent the thwarting of bringing the vessels into an Israeli port, they also limited the use of lethal and less-lethal weapons to self-defense and defense of others. Consequently, it appears that the use of such weapons was not authorized directly for the purposes of mission accomplishment, but only within the scope of self-defense. Therefore, notwithstanding the *ex post facto* categorization of the

848 *Id.*
849 *Id.*; Annex D to the *Naval Operational Order 3*, *supra* note 445.

IHH activists as civilians taking a direct part in hostilities, the authority to use force provided to the soldiers by the naval command was more restrictive than the law required. Since it is the ROE that set out the authority to use force, the analysis of how those directions were applied provides one framework under which the actions of the soldiers can be assessed.

208. The question to be addressed next is whether the self-defense-based ROE issued to the Israeli forces were consistent with the doctrine followed by other military forces. The International Institute of Humanitarian Law Rule of Engagement Handbook provides a helpful overview of how the law regarding the use of force in self-defense, defense of others, and mission accomplishment is generally interpreted and communicated to military personnel. As the Handbook acknowledges, both international and domestic law recognize the right of self-defense. That right can also include the authority to defend other persons. Self-defense is available in all situations, including during armed conflict.[850] From a doctrinal perspective, that right is often divided into individual[851], unit[852] and national self-defense.[853] Generally, Rules of Engagement drafted for military forces authorize the use of force to defend oneself against an attack or imminent attack. The use of force in self-defense requires the use of necessary and proportional means and actions. Further, a sequential escalation of force with an "aim to use the least harmful option available in those circumstances" is generally required in order for the use of force to be lawful.[854] However, whether such an escalation of force is possible is dependent upon the prevailing circumstances at the point that force is used.

209. Another issue is the authority to use force outside the scope of self-defense or defense of others, that is; for mission accomplishment. Such authority clearly exists under international humanitarian law.

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850 See *The ROE Handbook*, *supra* note 786, at 3, para. 8.

851 *Id.*, at 83, Annex D (where individual self-defense is defined as "the right of an individual to defend himself or herself (and in some cases other individuals) from *hostile act* or *hostile intent*." This is not to be confused with the right of individual states to act in self-defence as is reflected in art. 51 of the UN Charter).

852 *Id.*, at 85, Annex D (***unit self-defence*** the right of unit commanders to defend their unit, other units of their nation, and other specified units against *hostile act* or *hostile intent*.). However, see also Dinstein, War, aggression, and self-defence, *supra* note 344 (where he notes that the United States Rule of Engagement approach of distinguishing between defending elements or personnel of a defined unit ('unit self-defense') from 'national self defense' can be misleading in law of armed conflict terms since all self-defense international law in that context is national self-defense).

853 See *The ROE Handbook*, *supra* note 786, at 3, para. 8.a.

854 *Id.*, at 24; Appendix 5 to Annex A, para. 5.1.

However, the use of force beyond self-defense is not unique to armed conflict situations. As has been noted:

> Broadly speaking, during peacetime, the use of force is permitted in self-defense, in the exercise of law enforcement authority, and to accomplish operations or missions specifically authorised by a higher national authority or other governing body, such as the U.N. Security Council.[855]

Hence, there is a possibility to authorize the use of force beyond self-defense in the enforcement of the law, although such use is normally narrowly prescribed.[856]

210. The ROE Handbook recognizes that national approaches to self-defense often differ on the definition and content of the right of self-defense, and individuals "exercise this right in accordance with their respective national law."[857] This connection between national and international law is reflected in a decision from the International Tribunal for the Former Yugoslavia, *Prosecutor v. Dario Kordic*, which held that the principle of self-defense enshrined in the Rome Statute of the International Criminal Court reflects provisions found in most national criminal codes and could be regarded as a rule of customary international law.[858] The same principles are prevalent in Israeli domestic law governing the use of force in self-defense.[859]

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855 *Id.*, at 4, para. 13-13b. (which states in respect of law enforcement and UN sanctioned operations "[w]here the use of force is not justified by *self-defence*, but is nonetheless necessary for accomplishment of an assigned military mission, reasonable force may be exercised within the constraints of the relevant national and international law"); For a discussion of the authority to use force during MIO, see also Heintschel von Heinegg, *Maritime Interception*, *supra* note 778, at 392-393, para 20.12.

856 Note that even during law enforcement operations, the use of force is not strictly limited to self-defense or the defense of others. As the *U.N. Basic Principles*, *supra* note 810, at 2, para. 9 states, firearms can be used "to arrest a person presenting such a danger [threat to life] and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives." See also the European Convention on Human Rights, at art. 2(2):
Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
(a) in defense of any person from unlawful violence;
(b) *in order to effect a lawful arrest or to prevent escape of a person lawfully detained*;
(c) *in action lawfully taken for the purpose of quelling a riot or insurrection* [emphasis added].
However, the deprivation of life in such circumstances is narrowly prescribed. For example, see *The McCann* case, supra note 809; *Nachova and Others v. Bulgaria*, App. No. 43577/98, Eur. Ct. H.R., Judgment (2005); *Makaratzis v. Greece*, App. No. 50385/99, Eur. Ct. H.R., Judgment (2004); and *Kakoulli v. Turkey*, App. No. 38595/97, Judgment (2005/2006).

857 See *The ROE Handbook*, *supra* note 786, at 3, para. 8.

858 See Prosecutor v. Dario Kordic, *supra* note 793, at para. 451.

859 See e.g., C.A. 4191/05 *Eltgauz v. the State of Israel* (unpublished, Oct. 25, 2006), at para. 13; C.A. 4546/03 *Tadessa v. the State of Israel* (unpublished, Jun. 23, 2004), at para. 4; C.A.

211. The Commission is satisfied that the ROE provided for the operation were consistent with the practice followed by other nations regarding the provision of ROE for international operations. Further, it can be concluded that the ROE for the military operation contain principles similar to the human rights-based norms applicable in a law enforcement context.[860] Those principles are also reflected in many regional and domestic court cases dealing with the question of self-defense and the use of force by State authorities.[861]

General Assessment Regarding the Use of Force during the Enforcement of the Blockade

212. When assessing the use of force by Israeli soldiers during the enforcement of the blockade against the Gaza Strip, there are a number of factual and legal factors which are particularly relevant.[862] These factors include the resistance that the soldiers faced and the nature of their response to that resistance, as well as the type of weapons used. This analysis will now turn to the nature of the overall situation on board the *Mavi Marmara*. However, it should be noted, that the general principles guiding the analysis are applicable to the use of force on the other flotilla vessels.

The nature of the threat posed to the IDF

The overall situation

213. The soldiers' testimonies demonstrate the fact that the situation they anticipated (one of relatively minor civil disobedience)[863] was not

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6147/07 *Abisidris v. the State of Israel* (still unpublished, Jul. 2, 2009), at para. 33; C.A. 410/71 *Horovitz v. the State of Israel*, SCJ 26(1) 624, 628-629 (1972); C.A. 8554/00 *Zrabilov v. the State of Israel*, SCJ 57(4) 913, 917-918, at para. 5 (2001); C.A. 20/04 *Kliener v. the State of Israel*, SCJ 58(6) 80, 90-91 (2004).

860 These include the use of only necessary and proportionate force; escalation of the use of force; use of force including less-lethal and lethal weapons as a last resort; and the use of lethal force in self-defense or the defense of others against imminent threat of death or serious injury.

861 See, e.g., *The McCann* case, supra note 809; *Makaratzis v. Greece*, *supra* note 856; *Huohavanen v. Finland*, App. No. 57389/00, Eur. Ct. H.R., Judgment (2007); *Giuliani and Gaggio v. Italy*, App. No. 23458/02, Eur. Ct. H.R., Judgment (2009); and *Bubbins v. The United Kingdom*, App. No. 50196/99, Eur. Ct. H.R., Judgment (2005).

862 As is noted in *The McCann* case, supra note 809, at 160, para. 148 (where it is noted limiting the use of force to situations of absolute necessity indicates that "a stricter and more compelling test of necessity must be employed [than] that normally applicable when determining whether State action is 'necessary in a democratic society.'").

863 See, for example, para. 132 above. It should be noted that in the strategic discussions prior to the operation, the possibility that firearms might be present was mentioned,

the one they encountered - more than one soldier described the scene of violent assaults as being one of "combat." Above we described the chronicle of the takeover of the *Mavi Marmara* and the other ships. For the purposes of the analysis here, a few details described above should be reinforced.

The IDF soldiers - particularly those who fast-roped down to the roof of the *Mavi Marmara* from the first helicopter - encountered severe violence. While initially it was estimated that there were 10 to 15 IHH activists on the roof, their numbers doubled as the first soldiers landed there. A determined and organized opposition, which acted in concert, confronted the soldiers. Groups of three to five IHH participants met each soldier as they fast roped to the roof.[864] There was an organized effort to throw the soldiers of the first helicopter (carrying 15 soldiers) over the side of the roof or down through hatch openings to the IHH activists waiting below. The IHH activists captured three of the first four soldiers who landed on the roof (soldiers no. 1, no. 3 and no. 4) and there were still attempts by IHH activists to seize soldiers as late as when soldier no. 13 landed on the roof.[865] Even when the IDF soldiers established a secure area in one part of the roof, the IHH activists remained grouped together towards the bow and stern ends of that deck. Groups of IHH activists repeatedly threatened the soldiers through the deck hatches from the next lower deck (for this report, called the "bridge deck"). Such attacks continued from internal stairways and passageways inside the ship once the bridge deck was entered by the soldiers for the purposes of gaining access to the bridge and ultimately control of the ship.

214. All the IDF soldiers who descended to the *Mavi Marmara* from the first helicopter describe the following facts, which must be taken into account in the examination of the incidents of the use of force in which they took part. *First*, IDF soldiers were at a numerical disadvantage in relation to the IHH activists who were equipped with a variety of assault weapons. *Second*, the IDF soldiers expected a low level of violence and thus prepared, as a main scenario, for an unarmed confrontation with the ship's passengers. The soldiers were equipped with less-lethal weapons (e.g. paintball guns, beanbags) as their primary weapons and their live firearms (pistols or rifles) were used as secondary weapons. *Third*, the

nonetheless, from the soldiers testimonies it is evident that this did not transpire down the chain of command to the individual soldiers. For a detailed analysis, see para. 243-245 below.

864 Testimony of the commander of Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 4; The report's summery, *Id.*, at 5.

865 Testimonies of soldier no. 1, soldier no. 2, soldier no. 3, soldier no. 4, soldier no. 6, soldier no. 9, soldier no. 10 and soldier no. 13, *Id.*

harsh attack which all the soldiers descending from the first helicopter experienced in addition to the two factors mentioned above, caused the soldiers to sense that a real, clear, and immediate threat was being posed to the safety and physical well being of their fellow soldiers and themselves.

215. In addition, the testimonies of the IDF soldiers indicate that there were common features to the way the IHH activists dressed, looked, and acted. They were equipped with orange life vests, body armor, and gas masks.[866] However, perhaps the most distinctive characteristic of each IHH activists was that they were armed with weapons such as an iron bars, clubs, axes, slingshots, knives and, in some cases, firearms. In their testimonies, the IDF soldiers expressed surprise at these persons' willingness to continue to attack even when confronted with the use of flash bang grenades and firearms.[867]

216. However, the fact that most of the passengers on the upper decks of the *Mavi Marmara* appeared to be part of the IHH-directed group resisting the capture of the ship does not mean every person on those decks (or those who may have resisted more passively on the other ships) were automatically direct participants in hostilities. For example, during the fighting it was noted by one soldier that on one of the lower decks towards the center and stern of the ship there were many photographers with cameras.[868] In this regard, there is a continuing requirement under international humanitarian law to apply the principle of distinction in order to ensure that attacks are only directed at civilians taking a direct part in hostilities. This means that every soldier had to differentiate between those persons who were direct participants in hostilities and those who were not.

Use of weapons by the IHH

217. The use of weapons is an important criterion in determining whether a person is taking a direct part in hostilities. It is also relevant to the issue of self-defense, since a fundamental principle of self-defense is that any use of force must be proportionate to the threat that is presented. Where law enforcement norms are applied, factors such as the level of violence caused by the individual, the injuries that the individual has inflicted on state agents, and the amount of force needed to subdue him have been considered in the assessment of whether the use of force

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866 See para. 166 above.
867 Testimony of soldier no. 28, *IDF complementary response of 7.11.2010*, *supra* note 486, at 2.
868 Testimony of soldier no. 31, *Id.*, at 2.

was proportionate.[869] The use of "proportionate force" does not require that a proportionate response be of the same nature as the threat that is presented. For example, a person threatening the application of lethal force with an iron bar does not have to be countered with a club. Rather, the use of defensive force will be measured by the degree of force needed to effectively defend oneself or others and the means available to do so.

218. The right to use deadly force in self-defense is not limited to situations where a life is threatened; rather, the right is also applicable when serious injury can result. It is evident from the materials before the Commission that the IHH activists armed themselves with a wide array of "cold" weapons that were used in a manner which could cause death or serious bodily injury.[870]

The fact that the IHH activists were predominately armed with these weapons rather than firearms does not alter the fact that these weapons were "lethal". One soldier suffered a serious wound when stabbed in the stomach.[871] Another soldier avoided receiving a knife wound in his chest because the weapon struck the ceramic plate of his body amour.[872] The iron bars and other blunt force weapons caused significant head injuries to two other soldiers.[873] The injuries inflicted on the soldiers while they were on the ropes or as they let go of the ropes included broken or injured arms and hands,[874] as the soldiers used their arms to protect themselves.

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869 *Bekirski v. Bulgaria*, App. No. 71420/01, Eur. Ct. H.R. (2010), at para. 135; See also C.A. 6157/04 03 *Hoch v. the State of Israel* (unpublished, Sep. 9, 2005), at para. 14g.

870 See paras. 165, 167 above.

871 Testimony of soldier no. 3, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3. For the details of the injuries caused to soldier no. 3, see the medical reports received from Rambam Hospital and detailed in *IDF complementary response of 15.11.2010*. Among the injuries detailed: stab wound in the abdomen, facial bruise and gash in left hand, a fractured nose and torn tendon in the finger.

872 Testimony of soldier no. 5, *Id.*, at 3.

873 Testimony of soldier no. 4, *Id.*, at 2-3. For the details of the injuries caused to soldier no. 4, see the medical reports received from Tel Hashomer Hospital and detailed in *IDF complementary response of 15.11.2010*. Among the injuries and treatment detailed: compressed fracture to the skull, hematoma in right eye, seizures; the soldier was sedated and attached to respirator and received surgery to treat skull fracture. Testimony of soldier no. 1, *Id.*, at 2. For the details of the injuries caused to no. soldier 1, see the medical reports received from Rambam Hospital and detailed in the IDF's response to the Commission's request on this matter, *IDF complementary response to the Commission's Questions of 15.11.2010*, marked as exhibit 145 in the Commission's exhibits [hereinafter *IDF complementary response of 15.11.2010*]. Among the injuries detailed: a deep cut to the scalp, light internal bleeding in skull, fractured skull, injuries to the palm of his left hand (an X-ray showed that the injury was sustained in the same place as a previous fracture and therefore, his hand was put in a cast), and more.

874 Testimony of soldier no. 7, *Id.*; Testimony of soldier no. 8, *Id.*; Testimony of soldier no. 11, *IDF Completion Response of 7.11.2010*, *supra* note 486.

The soldiers were indeed protected by helmets and ceramic vests and some of them report to have been protected from grave injuries because of this equipment.[875] One soldier stated that his helmet had been shattered by the strikes he received during the incident (it should be noted that while all of the soldiers were equipped with helmets, which were not only strapped but fixed to their heads, some of these helmets shifted position on their heads during the fast-roping).[876] Further, the wide spread use of slingshots to fire iron balls, bolts, and glass marbles represented another form of force capable of causing serious bodily injury.[877] The attempts by the IHH activists to prevent the Israeli soldiers from boarding the *Mavi Marmara* from the Morena speedboats by cutting loose the climbing ladders represented another risk that might have caused death or serious injury.[878] These soldiers, who were attempting to board the *Mavi Marmara* from a smaller boat while both vessels were under way, were placed at grave risk by these actions of the IHH activists. Moreover, on two occasions when the Israeli vessels were positioning to board, two other Gaza flotilla vessels, the *Challenger 1* and *Boat 8000* maneuvered in such a way as to potentially collide with Israeli naval vessels. It required quick action by the personnel on the Israeli vessels to avoid collision.[879]

From the above, it is clear that the Israeli soldiers - on board the *Mavi Marmara* and on the Morena speedboats - were confronted with a large group of IHH activists who were armed with weapons capable of causing death and who were intent on causing death or serious bodily injury.

Use of Firearms by the IHH

219. Another issue to be addressed is whether IHH activists used firearms during the incident. Focusing on the issue of whether the IHH used firearms is misleading, since as mentioned, there is ample evidence that IHH activists used other lethal weapons in their assaults on the Israeli soldiers, which justifies the use of lethal force by those soldiers in self-defense or the defense of others. Therefore, the use of firearms is

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875 Testimonies of soldiers no. 3, *Inquiry Expansion of 20.9.2010*, *supra* note 451; and testimony of soldier no. 5, *Id*.

876 Testimony of soldier no. 5, *Id*.

877 Testimonies of soldier no. 11, soldier no. 20, soldier no. 24, soldier no. 25, soldier no. 26, soldier no. 27 and soldier no. 38, *IDF Completion Response of 7.11.2010*, *supra* note 486, indicate they were targeted with slingshots.

878 Testimony of Task Force Commander, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2-3.

879 The Israeli vessels were RHIB No' 2, threatened by the CHALLENGER 1 (See Testimony of Task Force Commander, at 1, *Id*.); and A Commanding Vessel, 'Zaharon', threatened by the Boat 8000 (See Testimony of soldier no. 19, at 1, *Id*.; See testimony of Commander of Missile Boat A, *Id*., at 2.)

not determinative of whether Israeli forces were justified in using lethal force in self-defense. However, the use of firearms by IHH activists is an important factor for two reasons. First, the use of firearms is important because it relates to the tactical situation which the Israeli forces confronted. The possible use of firearms significantly heightened the risk posed to the soldiers and their perception of that risk. Second, establishing the level of threat that the Israeli soldiers believed they were facing, is a factor in the assessment as to whether their response was proportionate.

220. The statements of the soldiers include a number of reports about the use of firearms. One of the salient issues is whether the IHH activists themselves brought firearms on board the *Mavi Marmara*. Apparently, there was security screening for passengers boarding the ships prior to departure. Such screening presumably was meant to ensure, *inter alia*, that weapons could not have been brought on board. However, 40 activists; the persons who have been deemed as the 'hard-core IHH group,' boarded in Istanbul without such a screening. Given this fact, and the fact that the evidence points towards the fact that the IHH had a preexisting plan to violently oppose the Israeli boarding, the Commission is not convinced that the pre-boarding security measures ensured that there were no weapons brought on board the *Mavi Marmara* by the IHH activists.

221. However, the Commission did not find that the evidence point conclusively to the fact that the IHH activists were using firearms which they brought on board the *Mavi Marmara* themselves. The IDF's position that the IHH activists brought the firearm on board is primarily based on three incidents: the timing of the shooting of soldier no. 2; the discovery of a non-IDF issued bullet in the knee of soldier no. 5; and the sighting of a non-IDF issued pistol on the roof of the *Mavi Marmara*. As will become evident, this is not sufficient.

Soldier no. 2 was shot in the stomach. The round that hit soldier no. 2 went through his body and was never recovered. As a result, no ballistics test could be performed to determine whether or not it came from an IDF weapon. However, it has been suggested in testimony and in a written submission to the Commission that soldier no. 2 was shot before there was an opportunity for Israeli military personnel to unholster their weapons.[880] Apparently this conclusion was reached based on an assessment by the Israeli military that soldier no. 2 was shot within the first 20 seconds of landing on the deck of the *Mavi Marmara*.[881] However,

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880 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 26; See also Testimony of Commander Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 9.

881 *Id.*

Soldier no. 2 did not indicate in his testimony that the shooting occurred within the first 20 seconds of landing on the deck of the *Mavi Marmara*. He states that immediately after he noticed that he was shot in the stomach, he drew his handgun, which deterred a number of IHH activists who were threatening him, and he then fired from a range of 5-6 meters at a person with a handgun at the back of the left wall. It is not clear from the testimony whether this pistol was used to shoot soldier no. 2. The statement of soldier no. 2 indicates that he fired simultaneously with soldiers no. 13 and no. 14 at the person holding the pistol.[882] Soldier no. 17 on helicopter no. 2 states that, from the vantage point of the helicopter, he saw an IHH participant holding what he believed to be a 9mm pistol.[883] Soldier no. 14 immediately went to the body of the IHH participant and retrieved a Glock pistol. In response to the Commission's inquiry, Soldier no. 14 stated that he believed this pistol to be an Israeli-issued weapon. From this fact, it seems that the IDF's estimate that the shooting happened some 20 seconds after the fast-roping from the first helicopter began, could be mistaken. In order for soldier no. 13 and no. 14 to be involved in this shooting, it would likely have had to occur approximately 1-2 minutes after soldier no. 2 landed on the deck. Soldier no. 12 stated that when he first encountered soldier no. 2, that soldier initially thought a less-lethal weapon from the Israeli forces might have hit him. Shortly after, soldier no. 2 informed soldier no. 12 that he had realized he had in fact been hit by a bullet.[884] It should be noted, that at this stage, three other IDF soldiers who were abducted by the IHH activist, had already fast-roped to the roof of the Mavi Marmara. It seems that two of them, were already overpowered and stripped of their equipment and weapons, including Glock pistols, at this point.[885] It is probable that it is one of these weapons which the IHH participant had in his possession. Thus, the Commission finds it hard to establish based solely on this event that the said weapon was necessarily a weapon brought on board the *Mavi Marmara* by an IHH activist.

Soldier no. 5 received a gun shot wound in the knee. He believes that he was shot when there were only five soldiers on the deck. In this case, the bullet remained in his knee. After the bullet was recovered from his knee, it was determined that it was not of a type presently in use by the Israeli military. However, in the Chief of Staff's general testimony, the

882 Testimony of soldier no. 2, *Id.*; Testimony of soldier no. 13, *Id.*; and Testimony of soldier no. 14, *Id.*

883 Testimony of soldier no. 17, *Id.*, at 1; Supplementary Testimony of soldier No. 17, *IDF Completion Response of 7.11.2010*, *supra* note 486.

884 Testimony of soldier no. 12, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3.

885 Testimony of soldier no. 13, *Id.*, at 3; Testimony of soldier no. 14, *Id.*, at 1.

Commission was informed that the bullet was 9 mm in caliber and had previously been in use by the IDF until 2007.[886] Again, without ballistics tests it is not possible to confirm which weapon fired the bullet.

There were other incidents in which IDF soldiers reported seeing IHH participants use weapons or where they observed the effects of gunfire. For example, soldier no. 33 fired at the legs of an IHH participant who was firing a revolver at the soldiers.[887] What was described in military terminology as "long guns" or rifles, were also seen on the bridge deck level. Soldier no. 9 stated that he fired at an IHH participant when he saw a gun barrel, whose length and caliber corresponded with a rifle, protruding from an opening of the floor.[888] Another soldier stated that he saw a "long firearm" being thrown over the side of the ship.[889] Another soldier stated that he saw both a "long gun" and a pistol being fired by IHH participants, albeit the latter sighting was made from a distance of 40 to 50 meters.[890] Those weapons were never located. There are also statements from Israeli military personnel on board the Morena speedboats and accompanying naval vessels stating that gunfire was directed at the Morena speedboats.[891] At one point, a Morena speedboat reduced its speed and quickly altered its course in order to avoid such fire.[892]

One soldier believed he saw a handgun lying on the deck with a "hammer" that bore no resemblance to the 9mm Glock handgun used by the Israeli soldiers. However, this weapon was not found after the incident.[893] Furthermore, most of the testimonies do not specify whether the weapons they reported seeing were weapons used by the IDF. It is important to note that during the initial stages of the fighting, two mini-Uzi weapons were taken from captured Israeli soldiers.[894] An IDF pistol with an empty magazine was also found hidden under a sofa located on one of the lower decks. Under these circumstances, the Commission cannot establish whether IHH activists brought firearms on board the *Mavi Marmara*.

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886 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70.
887 Testimony of soldier no. 33, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2.
888 Supplementary Testimony of soldier no. 9, *Id.*
889 Testimony of soldier no. 33, *Id.*, at 3.
890 Testimony of soldier no. 32, *Id.*, at 2.
891 Testimony of soldier no. 19, *Inquiry Expansion of 20.9.2010*, *supra* note 451; Testimony of Team Commander R, *Id.*; See also Supplementary testimony of Commander of Center A, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2.
892 Testimony of soldier no. 19, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2.
893 Testimony of soldier no. 6, *Id.*, at 7.
894 Testimony of soldier no. 1, *Id.*, at 2; Testimony of soldier no. 3, *Id.*, at 2.

222. However, and having reviewed the available evidence, the Commission finds that members of the IHH activists used firearms against Israeli forces on May 31, 2010, in their efforts to repel the boarding of the *Mavi Marmara* by Israeli military personnel. In reaching this conclusion, the Commission has taken into consideration that the melee on board the *Mavi Marmara*, especially during the initial stages on the roof, was a situation of considerable confusion. The use of slingshots with metal and glass balls added to that confusion because some soldiers believed they represented pistols and gunfire,[895] although other soldiers stated that they differentiated between the sound of gunfire and marbles fired by slingshots.[896] In addition, iron bars were sometimes mistaken for the barrels of rifles.[897] For a considerable period of time, the soldiers thought soldier no. 5 had been shot in the head, when his head injuries actually resulted from physical assaults.[898] Such confusion is a normal part of conflict; often termed the "fog of war." However, the physical evidence of gunshot wounds; the statements of numerous soldiers operationally experienced in the use of firearms who gave accounts of seeing weapons in the hands of IHH activists; and the fact that IHH activists had access to captured IDF handguns and mini-Uzis, supports the conclusion that the IHH used firearms against Israeli military personnel.

223. Following the conclusion that the IHH activists did indeed use firearms, there are two factors that should be taken into account when assessing the use of force by the IDF soldiers. The use of firearms by the IHH impacted the soldiers in two ways. First, while the operation had planned for less-lethal weapons to be carried as the primary weapon, with lethal weapons remaining holstered, the initial fighting on the roof resulted in an order to switch to "live" weapons. This order appears to be reasonable given the nature of the violence experienced by the soldiers; the continuing threat that the soldiers faced; and the fact that a number of soldiers were seriously wounded. Although this meant that often the most readily available weapon to them was a lethal weapon, it did not mean that the use of less-lethal weapons was abandoned. Some of the IDF soldiers continued to use less-lethal weapons, either by switching between lethal and less-lethal weapons or as their primary weapon.[899]

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895 For example, see Testimony of soldier no. 13, *Id.*, at 4.

896 See Supplementary Testimony of soldier no. 9, *IDF Completion Response of 7.11.2010*, *supra* note 486; See also Testimony of soldier no. 33, *Id.*

897 Testimony of soldier no. 34, *Id.*, at 2.

898 Testimony of soldier no. 14, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; The medic treating soldier no. 5 who due to the severity of his head injury thought he had been shot in the head in addition to having fractures in the limbs and a bullet in the knee.

899 Testimony of Commander Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at

Secondly, the use of firearms also impacted on the soldiers' view of the nature and imminence of the threat. Assaults with iron bars and knives require a close proximity between the assailant and the person being assaulted (although there is also considerable evidence that in some cases IHH activists threw iron bars and other objects at the soldiers as well). Generally, however, the use of such weapons means that the assailant has to expose himself physically to the person being threatened. In such circumstances, when identifying such a weapon from a distance, there is often a greater opportunity to use less-lethal weapons in response. However, the use of firearms does not require that same degree of physical exposure or close proximity by the assailant. When it became clear to the soldiers that the IHH activists were using firearms, the soldiers were particularly cognizant of the heightened risk and the different nature of the threat. As a general rule, whenever an individual is carrying a firearm, there is a heightened risk to the lives of state agents and others. Thus, even if the firearm is not directly aimed at anyone, the use of lethal force in response can under certain circumstances be considered to be necessary and proportionate.[900]

The Nature of the Response by the IDF

Legal Test for Assessing Decision Making

224. A number of factors should be taken into consideration when assessing the lawfulness of the use of force by individual soldiers.[901] The test for assessing a decision by a soldier to target a military objective is whether it is reasonable to believe that the potential target is a lawful one.[902]

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900 *Huohavanen v. Finland*, *supra* note 861, at para. 97.

901 See *Giuliani and Gaggio v. Italy*, *supra* note 861, at paras. 217-225 (where the European Court of Human Rights took into account the findings of an investigating judge which was based on "the testimonies and images showing the violence of the demonstrators' attack, the constant barrage of stones to which the vehicle was subjected and which caused physical harm to its occupants, and the aggression shown towards the passengers by the demonstrators, who had continued to surround the vehicle at very close quarters while thrusting hard objects inside. This situation of persistent danger undeniably amounted, in the judge's view, to a real and unjust threat to the personal integrity of [the policeman] and his colleagues and called for a defensive reaction that had been bound to culminate in [policeman] using the only means at his disposal: his weapon." However, the Court has also emphasized that public disturbances does not give law-enforcement officials carte blanche to use firearms. On the contrary, there is a heightened responsibility to organize the actions of the police carefully with a view to minimizing a risk of deprivation of life or bodily harm"); See also Haled Ganaim, Doron Menashe & Mordechai Kremizer, *The Boundaries of Exercising Fatal Force when Arresting*, 25 Legal Studies 703, 730-731 (2009).

902 Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, paras. 50, 51, 55 (Dec. 5, 2003); See also Michael N. Schmitt, *Fault Lines in the Law of Attack*, *in* Testing the Boundaries of

In a law enforcement context, the reasonableness of the use of force when depriving someone of his or her life is generally decided on the basis of the facts "which the user of the force honestly believed to exist: this involves the subjective test as to what the user believed and an objective test as to whether he had reasonable grounds for that belief."[903] Thus, both international humanitarian law and human rights law recognize the test of "reasonable belief" with respect to decisions to use force.[904] A test of reasonable belief does not require perfection. A person using force can have an honest but mistaken belief regarding the basis upon which the force is used.[905] In a law enforcement context, once reasonable belief is established, "it must then be determined whether it was reasonable to use the force in question in the prevention of crime or to effect an arrest."[906]

225. Generally, the law also recognizes that decisions often have to be made under duress and in a compressed time period. As the United States Supreme Court famously stated, "Detached reflection cannot be demanded in the presence of an upturned knife."[907] Further, it has been noted, "Police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation."[908] Finally, as the European Court of Human Rights has indicated, a court making an *ex post facto* examination cannot, "detached from the events at issue, substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life."[909] This principle is also recognized under the Israeli law of self-defense.[910]

The difficulties of assessing in hindsight the appropriate response to lethal force should be kept in mind when reviewing the actions taken by Israeli soldiers on the *Mavi Marmara*. The confined and crowded spaces on the ship and the repeated attempts by IHH activists to press home lethal attacks with iron bars, knives, chairs, etc, often left the Israeli soldiers with little time to contemplate the use of less-lethal means. That

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International Humanitarian Law 277, 304 (Susan Breau & Agnieszka Jachec-Neale, eds. 2006).

903 *The McCann* case, *supra* note 809, at para. 134.

904 Prosecutor v. Galic, *supra* note 902; *The McCann* case, *supra* note 809, at para. 200.

905 *The McCann* case, *supra* note 809, at para. 200; *Huohavanen v. Finland*, *supra* note 861, at para. 96; See also *Giuliani and Gaggio v. Italy*, *supra* note 861, at para. 224.

906 *The McCann* case, *supra* note 809, at para. 134.

907 See U.S. Supreme Court, *Brown v. United States* 256 U.S. 335, 343 (1921).

908 See U.S. Supreme Court, *Graham v. Connor* 490 U.S. 386, 397 (1989).

909 See also *Giuliani and Gaggio v. Italy*, *supra* note 861, at para. 224; and *Bubbins v. The United Kingdom*, at para. 139, *Id*.

910 *Eltgauz v. the State of Israel*, *supra* note 859.

being said, as a review of the evidence establishes, the soldiers made use of less-lethal means even in the context of the crowded conditions on the deck.

The Use of Lethal and Less-Lethal Weapons

226. A proportionate response envisages a graduated use of force with an emphasis on considering the use of less-lethal weapons prior to the use of lethal ones. Such a graduated response, however, is not required under international humanitarian law. While the term "non-lethal" is often used doctrinally, the IDF prefers the term "less-lethal" weapons. This choice reflects the reality that any weapon has the potential for lethal consequences.

The NATO definition for non-lethal weapons highlights that what separates "lethal" from "less-lethal" weapons is the intended effect of incapacitation combined with a low probability of death or injury:

Non-Lethal Weapons are weapons which are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimal undesired damage or impact on the environment.[911]

This definition is similar to the Israeli definition of less-lethal weapons found in the ROE for the operation, which stated: "An instrument which, by its purpose, can cause a temporary function-disability, and which its probability to cause death or lethal injury, when used in its proper way, is low."[912]

It should be noted that a weapon designed to be less-lethal may nevertheless cause death or injury, such as a beanbag round used at close range. Obviously, the fact that a weapon is labeled as "less-lethal" does not mean it cannot be used *in extremis* in self-defense. Therefore, even if the ROE put safety restrictions on its use, that does not mean it could not be used outside these restrictions under threat of serious injury or death, as long as it would meet the requirement of legally permissible use of proportionate force.

227. The less-lethal weapons used during the operation included both impact weapons (paintball guns and beanbag rounds) and conducted-energy weapons (in this case, Tasers). The use of paintball guns was a choice that reflected the fact that a very low level of resistance was anticipated. In

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911 See North Atlantic Treaty Organization (NATO), *NATO Policy on Non-Lethal Weapons*, Press Release, para. 3 (Oct. 13, 1999) *available at* www.nato.int/docu/pr/1999/p991013e.htm.

912 *Naval Operational Order 3*, *supra* note 445, annex G, at 61.

this context, it should be noted that the color of the paintballs chosen for the operation was red. Retrospectively, it turned out that this choice was used by various advocates to claim that the red marker in the paintball rounds was blood on the decks and outer hull of the *Mavi Marmara*. These advocates used this as evidence that the IDF soldiers used excessive force, when, in fact, just the opposite was the case.[913] "Flash bang" grenades were used as a warning device. These grenades, which create both a loud noise and bright light, have limited potential for injury even if ignited next to a person. Indeed, at one point one of the Israeli soldiers ignited such a grenade against his body while he was lying on the deck in a successful effort to cause the group of IHH activists who were assaulting him to step back.[914]

In this context it should be mentioned that the use of other less-lethal weapons was considered. Due to the close quarters of the vessel, it was decided not to use certain ammunitions, such as "baton" rounds[915] and the use of CS gas (i.e. teargas or maloderant) was found inappropriate to the nature of the operation (due to the conditions at sea and the presence of a strong downdraft from the helicopters, which did not allow for their effective use).[916]

All less-lethal weapons used by the Israeli forces underwent legal and medical review prior to being authorized for use, and the soldiers received extensive training on them prior to deployment (see para. 120, footnote 441). A number of the less-lethal weapons were specifically approved and issued for this operation, and the naval forces - which in the ordinary course of events would not use such weapons - received specialized training on their use.[917] Overall, the Commander of the Shayetet 13 assessed that the paintball guns and other less-lethal weapons prevented harsher results and were effective when limited force was required.[918] The commander of center B, commanding the force taking

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913 See *YouTube: Israeli Paintball Attack on the Mavi Marmara*, www.youtube.com/watch?v=cO4Hirkx7iw (2010).

914 Testimony of Soldier no. 6, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3.

915 *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 14-15.

916 *The Eiland Report*, *supra* note 402, at 92-93, 155-157; See also *Additional Protocol I*, *supra* note 292, art. 36, which provides for the legal review of weapons, means or methods of warfare "to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party". Such a review often relies on medical evidence regarding the potential or actual effect of such weapons.

917 *The Eiland Report*, *supra* note 402, at 92-93.

918 Testimony of Commander Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 8-10.

over *Boat 8000* and *Gazze*, expressed a similar opinion.[919] However, the statements of the Israeli soldiers on board the *Mavi Marmara* indicate that these weapons were not always effective in stopping IHH activists who were intent on harming them.[920]

228. The term "lethal" weapon, which is defined in the Oxford Dictionary as "sufficient to cause death", is associated with the more traditional weapons carried by the Israeli soldiers: the Glock 9mm handgun, the 9 mm mini-Uzi and M-16 assault rifles. The weapons carried by the helicopter borne force were holstered, either attached to the equipment vests or to the legs of the soldiers (in the case of the 9mm handgun) or strapped to their backs (for the mini-Uzi and M-16s).[921] The mini-Uzi, which is capable of automatic fire, was only used in the single shot mode throughout the operation.[922] These weapons appeared to cause the majority of the deaths and serious injuries to the IHH activists.[923]

Estimating the number of shots fired that actually hit their target is very difficult. From the military debriefings, it appears that, during the course of the operation on the *Mavi Marmara*, the Israeli forces discharged 308 rounds (from the soldiers' testimonies, it appears that 110 rounds were shot aimed at persons; an estimated 39 hits were identified by the soldiers; out of which an estimated 16 participants were injured by shots to the center of mass), 87 bean bags, and 264 paint ball rounds.[924] The number of rounds fired does not in and of itself imply that the use of force was excessive. From the soldiers' testimonies, it appears that a significant number of rounds were not fired directly at IHH activists. The IDF applied a graduated use of force, including the use of warning shots and deterring fire.[925] When appropriate to limit the chance of causing death or serious injury, the Israeli military's graduated use of force also provides

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919 Testimony of Commander of Center B, *Id.*, at 3-4.

920 Testimony of soldier no. 11, *IDF Completion Response of 7.11.2010*, *supra* note 486; Testimony of soldier no. 22, *Id.*; and Testimony of soldier no. 24, *Id.*

921 Testimony of soldier no. 5, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2-4; See also *The Eiland Report*, *supra* note 402, at 108-109.

922 *The Eiland Report*, *supra* note 402, at 104, 107.

923 *Id.*, at 107-108.

924 *Id.*, at 109; See also testimony of Commander Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 8, according to him it has been estimated that 70 of the rounds were directed to the bodies of IHH personnel, and about 50 to their legs and the rest of them for warning only.

925 *The Eiland Report*, *supra* note 402, at 117; Although the definitions are not precise, it seems that the distinction between warning shots and deterring fire is primarily determined on the basis of where the round is aimed. Warning shots are directed away from the targeted person, while deterring fire is aimed at a safe location but close to an individual in order to provide a more direct warning. For example, during the operation, deterring fire was directed at the sides and deck of the ship.

for firing at the legs and feet of a person. This use of force appears to have resulted in the wounding of a number of the IHH activists. In determining whether such disabling fire is excessive, it must be weighed against the alternative of shooting at the center of visible mass of the target, with increased likelihood of death or serious injury.

229. The evidence shows that the IDF soldiers made considerable use of graduated force during the operation, with soldiers switching repeatedly between less-lethal and lethal weapons, depending upon the threat being posed.

Firing from Helicopters

230. The Commission has reached the conclusion that the Israeli army did not fire any rounds from the helicopter. The only force that was used on the helicopters were 3-4 "flash bang" grenades that were deployed from the first helicopter in the initial stages of the fast roping to attempt to stop IHH activists from interfering with the ropes. The accurate use of firearms from a helicopter requires both specific equipment and specially trained personnel, with which the helicopters were not equipped.[926]

A high angle of the trajectory of wounds in some deceased IHH activists could have been the result of a number of factors. First, some firing took place under circumstances where IHH activists were on top of or bent over one Israeli soldier who was lying on the deck while they were assaulting him.[927] Secondly, firing also took place from the roof down towards the IHH activists who were threatening the IDF soldiers on a lower deck.[928] Finally, in some instances, numerous rounds were fired either by one soldier or by more than one soldier to stop an IHH activist who was a threat to the lives of themselves or other soldiers.[929] It

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926 See testimony of Commander of Sheyetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 9-10; Testimony of the pilot of Helicopter 1, *Id*., at 2; Testimony the pilot of Helicopter 2, *Id*., at 1-2; Testimony the pilot of Helicopter 3, *Id*., at 1-2.

927 For example, see the testimony of soldier no. 1, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; Testimony of soldier no. 2, *Id*., at 2; Testimony of soldier no. 3, *Id*., at 2.

928 For example, as set out in the testimony of soldier no. 12, *Id*., at 4.

929 For example, see the testimony of soldier no. 2, *Id*., at 2, indicates he fired 2-3 rounds to the center of mass and below and one round to the head (the solider testified that after firing the last round the IHH personal fell and he ceased fire); See also the testimony of soldier no. 7, *Id*., at 2, who states he fired 5-6 rounds at a person running at him with a club.
For example, in firing at an IHH participant with a pistol in his hand, soldier no. 13, *Id*., at 2, estimates that he, soldier no. 2 and soldier no. 14 fired 15 rounds at that person; Similarly, soldiers no. 8, *Id*., at 2, states that he and no. 12 fired at the same group of IHH participants threatening them with the weapons they had in their hands at the time (with Glock pistols).

cannot be discounted that some rounds impacted when the person had already started to fall.

Use of Tasers and other Less-Lethal Weapons to Effect Detention

231. Inherent in the authority to use force under international humanitarian law is the power to detain someone who poses a threat to the safety of military personnel or who is interfering with the conduct of a mission. Similarly, law enforcement norms provide for the use of force to "arrest" a person presenting a danger of death or serious injury or resisting their authority.[930] This question is particularly relevant to the use of force with less-lethal weapons against those persons who are assessed *not* to have taken a direct part in hostilities and to whom the principles of "necessity" and use of "proportionate force" apply as a matter of law.

In a domestic law enforcement context, the question of when less-lethal weapons such as conducted energy weapons can be used to carry out a detention, has been considered in a domestic law enforcement context, as such weapons are used by law enforcement officials as part of a use of force continuum against various levels of resistance (these levels can be generally categorized as cooperative, passive resistance, active or defensive resistance, assaultive, and grievous bodily harm or death).[931] A particular focus has been on the use of Tasers as a method of "pain compliance" against persons who are passively or defensively resisting arrest.[932] It has been variously suggested that such weapons should be restricted to situations where a person poses an immediate threat of death or serious injury and no lesser options are available[933]; the person is causing bodily harm or poses a threat of imminent bodily harm[934]; or at levels above passive resistance and consider banning their use against defensive resistance.[935] However, it cannot be stated that there is a broad

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930 See *U.N. Basic Principles*, *supra* note 810, at para. 9 (e.g. firearms can be used against someone who is presenting a danger of an imminent threat of death or serious injury and resisting the authority of law enforcement officials).

931 See *Braidwood Commission on Conducted Energy Weapon Use, Phase I Report* 97 (Jun. 18, 2009) (referring to the Canadian National Use of Force Framework); See also David A. Harris, *Taser Use: Report of the Use of Force Working Group of Alleghany Country*, Legal Studies Research Paper Series, Working Paper No. 2008-32 7 (2009) (for a similar use of force continuum applied in the American context).

932 See Harris, *Taser Use*, *supra* note 931, at 7 (Passive resistance is generally involves not cooperating with commands and taking action such as lying down so that they can be carried away; The author would extend to tensing and bracing. Defensive resistance is described as "twisting, pulling, holding onto fixed objects or fleeing").

933 *Less Than Lethal?: The Use of Stun Weapons in US Law Enforcement*, Amnesty International 58 (2008).

934 See *Braidwood Commission*, *supra* note 931, Executive Summary, Part B, at para.2.

935 See Harris, *Taser Use*, supra note 931, at 6.

consensus that the use of Tasers even in the situation of passive resistance is unlawful.[936]

As a result, the Commission concludes that the Israeli forces' use of Tasers to carry out the detention of civilians is not unlawful under international law, although it is the subject of considerable controversy, particularly when such force is used against persons passively and defensively resisting state officials. A similar conclusion can also be reached with respect to other less-lethal weapons, such as paintball guns.

Analysis of the Use of Force by IDF Soldiers during the Takeover Operations on May 31, 2010

232. As stated above in the general assessment of the use of force, the material before the Commission indicates that lethal force including firearms was used by IHH activists against the IDF soldiers attempting to stop the *Mavi Marmara* from breaching the blockade. In response, the IDF soldiers used force, ranging from the use of flash bang grenades to live fire. There was less resistance encountered on the other vessels and, correspondingly, less force was employed by the IDF soldiers.

233. The Commission has examined each instance of the use of force reported by the IDF soldiers in their testimonies, pursuant to the limitations discussed below. Not only was the use of force undertaken by each soldier assessed, but the specific circumstances under which the use of force occurred and additional available relevant information concerning the use of force was also considered.

234. Each use of force was assessed according to the applicable law - international humanitarian law. According to that legal regime, the use of force against civilians who are not taking a direct part in hostilities is governed by law enforcement norms, whereas direct participants can be targeted for such time they are taking part in hostilities. Thus, the Commission examined first whether force was used against a civilian

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936 Buckley v. Haddock, 292 Fed. Appx. 791, 2008 U.S. App. LEXIS 19482 (Sep. 9, 2008 11th Cir.); See also Warren Richey, *Police Tasers: Excessive Force or Necessary Tool?* (May 28, 2009) (for reference to the case of Jesse Buckley where the US Supreme Court declined to hear an appeal of a lawsuit of a motorist against a police officer who "tased" the individual for refusing to stand up and walk to a patrol car) *available at* www.csmonitor.com/USA/Justice/2009/0528/p02s05-usju.html?cmpid=addthis_email&sms_ss=email&at_xt=4d1f8b1713c34d53,0. See also See *Braidwood Commission, supra* note 931, at 67-69 (where the Commissioner was not satisfied that the normal use of conducted energy weapons violated the United Nations Conventions against torture and other cruel, inhuman and degrading treatment or punishment in customary international law).

taking a direct part in hostilities. Where it was determined that the person was a direct participant, an assessment of the use of force was first made using the applicable rules of international humanitarian law. If the person against whom force was used was determined not to have taken a direct part in hostilities, that use of force was assessed solely under law enforcement norms.

235. As has been noted, the Rules of Engagement (ROE) issued for the operation were developed in anticipation that the persons on board the Flotilla were civilians not taking a direct part in hostilities. The planned use of force was based on the same principles as those applicable in a law enforcement context, with the ROE primarily permitting the use force in self-defense.[937] In a similar vein, the Israeli Government has on a number of occasions stated that the force by used Israeli forces was in self-defense.[938] Therefore, all the uses of force were analyzed pursuant to law enforcement norms to confirm the degree to which the they fell within the scope of those norms, including self-defense or defense of others. The assessment also served to highlight the degree to which the Israeli personnel endeavored to restrict their actions to the limits of the ROE while being confronted with significant and unanticipated levels of violence on board the *Mavi Marmara*. This analysis indicates the challenges that can arise when a self-defense based ROE is applied to accomplish a mission in the context of an armed conflict.

The conclusions of this analysis are presented below. The detailed testimonies of the soldiers as well as their analysis can be found in an annex to the report. The Commission decided, while giving due consideration to article 539 A of the Military Justice Law 5715-1955, to privilege this annex pursuant to its authority under Article 11 to the Government's decision of June 14, 2010, unless the government decides to lift this privilege. The Commission recommends that the Government will examine the possibility of making this annex public pursuant to its authority under law.

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937 However, it should be noted that the use of graduated force, such as use of less-lethal weapons, are not required under the general framework of international humanitarian law when using force against combatants or persons taking a direct part in hostilities.

938 See *Prime Minister's Open Door Testimony*, *supra* note 82; See also *Israel Ministry of Foreign Affairs: Gaza Flotilla: Excerpts from Press Conference with DM Barak, CoS Ashkenazi and Naval Commander Marom*, www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/Gaza_flotilla_press_conference_DM_Barak_CoS_Ashkenazi_Naval_Commander_31-May-2010.htm (2010) (quoting Naval Commander Major Eliezer Marom: "Once an imminent danger to life was seen, in order to defend themselves the soldiers had to operate their weapons… the soldier's lives were in danger, they had to use live ammunition to defend themselves").

236. At the outset, a general comment is called for regarding the evidence before the Commission at the time it formed its conclusions, and the ability of the Commission to draw conclusions using the tools at its disposal. The analysis by the Commission is based primarily on the documented testimonies of over 40 soldiers and commanders who played an active role in the takeover of the *Mavi Marmara,* as well of the commanders of the takeover of the other vessels in the flotilla, and of other commanders and soldiers who took part in the operation on May 31, 2010. The Commission furnished written requests to IDF authorities seven times in order to deepen and expand the inquiries that were conducted.[939] Pursuant to these requests for information, additional soldiers provided statements and soldiers who had already done so added to their submissions. As a general rule, the Commission found that the soldiers' accounts were credible and trustworthy. The soldiers gave detailed information, used natural language, and did not appear to have coordinated their versions. The soldiers' accounts were examined meticulously, cross-referenced against each other, and verified, as far as possible, against additional materials submitted to the Commission. This included medical documents regarding the injuries to the soldiers, IDF inquiries regarding the amount and types of ammunition (paintballs, beanbag rounds, flash bang grenades, and live ammunition) fired during the various events and a review of the magnetic media furnished to the Commission.

237. The Commission's ability to construct a complete picture of the incidents in which force was employed by IDF soldiers is limited for a number of reasons. *First*, the incidents on May 31, 2010, involved many participants, took place at night in several different locations and on a number of decks, and, according to the soldiers' testimonies, the violence surprised them with respect to its intensity. By its very nature, the Commission's ability to "dissect" the operation into its various components and, several months later, retroactively reconstruct each and every incident that took place during the operation is and cannot be perfect. It should also be noted that the soldiers' statements were only documented in writing and submitted to the Commission. The soldiers were not put on notice that their rights were implicated when giving their statements (which is the ordinary proceedings in a custodial interrogation or judicial proceeding) and they did not undergo cross-examination.

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939 For details of the Commission's requests for information to the IDF, see *supra* para. 9, in this report.

Second, some of the flotilla participants were interrogated by the Israeli Police[940] and by Military Intelligence,[941] and while their versions do indeed shed some light on what transpired on board the *Mavi Marmara*, nevertheless, it was not possible to conduct an organized examination of the IDF soldiers' use of force during the takeover events in reliance on these accounts. It should also be noted that even the Military Intelligence investigators stated that the interrogations themselves were conducted under conditions that were not suited to such an inquiry.[942] In addition, and as stated above, the Commission's requests to the captain of the *Mavi Marmara* and the chairman of the IHH, and its general invitation to the other flotilla participants, to testify before the Commission received no responses - except from two Israeli citizens who did testify.[943] Under these circumstances, the analysis was based primarily on testimonies and materials that were submitted by Israeli sources.

Third, from the time the events occurred to the initiation of the various investigations, the scenes in which the events took place were not kept "sterile". Some of the bodies of those who were killed were moved from the places where they had been shot, the bullets and shells found on the *Mavi Marmara* were not collected in an organized manner, the various assault weapons used by the IHH activists (knives, clubs, slingshots, etc.) were gathered in one location and not documented as they were apprehended, etc. The Commission will address this issue as part of the discussion of article 5 of the Government's decision of June 14, 2010, which will be presented at a later time, and which relates to the method of examining and investigating the complaints that have been raised regarding violations of the laws of war, both in general and with respect to the events of May 31, 2010, in particular.

Fourth, the Israeli authorities do not have access to autopsy reports; but rather only to the reports from an external examination of the bodies of those who were killed. As stated above, the reason for this stems from

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940 Overall, 42 of the flotilla participants were questioned by the Israeli police. They were all given notice of their right to an attorney and the questions were translated to them (excluding those who were citizens of Israel). The majority of the participants refused to sign the statements, a large portion refused to answer questions, and out of those who gave a statement, their versions were sparse and did now allow for a complete picture to be reconstructed.

941 Overall, 86 of the flotilla participants were questioned by the Military Intelligence. From reviewing the report of that questioning, it appears that a relatively small portion of the flotilla participants referred in their questioning to the use of force by the IDF soldiers. Most of those flotilla participants did not specifically refer to such events which would enable at legal analysis of the use of force.

942 See article 03/0610A2415004 *Military Intelligence Reports, supra* note 491, at 6.

943 See *supra* para. 9 in this report.

the Turkish government's request, immediately after the event, that the Israeli government would not perform autopsies on the bodies of the deceased.[944] As a result, the gunshot wounds on the bodies cannot be linked to the weapons used by the IDF soldiers and autopsies were not available to assist in trying to determine who shot the deceased.

Fifth, the Commission received magnetic media of various types that had been collected from the *Mavi Marmara* upon conclusion of the vessel's takeover. As stated, the magnetic media includes videos and photographs from digital cameras and video recorders used by the flotilla participants, videos from the security cameras aboard the *Mavi Marmara*, videos, and recordings from the IDF's recording devices. This material constitutes objective and reliable evidence. On several occasions, the Commission asked the IDF whether all of the media that was seized had been furnished to the Commission. On December 23, 2010, the Commission received the response that all of the magnetic media that had been collected on the *Mavi Marmara* and which was technically sound had been examined by the IDF, and that the relevant files had been copied and given to the Commission,[945] with the exception of one video in which IHH activists are seen beating and videotaping the soldiers who had been abducted inside the ship. That video was provided with the IDF response. That response stated that "the examination of the relevant sources indicates that, other than this video, all of the material that was found on the devices which were confiscated from the flotilla participants has been furnished to the Commission."[946] On December 30, 2010, however, the Commission received another file of videos from the IDF authorities, containing another copy of said video, as well as five additional videos in which IHH activists are seen beating and videotaping the IDF soldiers who were abducted inside the ship, and which were not previously in the Commission's possession.

That said, several hundreds of hours of video evidence was reviewed. Unfortunately, the vast majority of it was not helpful in resolving the incidents involving the use force and not all of the events recorded by the magnetic media can be matched with the soldiers' testimonies. A number of the events documented in the magnetic media could match more than one of the events described by the soldiers, whereas, regarding other

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944 See the letter from the Turkish ambassador to the Minister of Foreign Affairs (2 June, 2020) in a binder from Rafi Barack, marked as exhibit 169 in the Commission's exhibits.

945 See IDF response for additional information of the Commission from Dec. 8, 2010, exhibit 158 in the Commission's exhibits. According to the IDF's response, the test of "relevancy" was defined as any connection directly or indirectly to the event, in contrast to pictures or private messages that were not connected to the event.

946 *Id.*, at 2, art. 6.

events, it is not clear whether they are in fact described in the soldiers' testimonies. Thus, for example, after analyzing one of the videos in which a soldier is seen firing at an IHH activist armed with an iron bar who was attacking him, the Commission was unable to relate this incident to a specific event described in the soldiers' testimonies (this incident could possibly correspond to a number of different events that were described).

238. The Commission took upon itself a complicated project, which had obvious limitations. It should be stated here that this analysis is particularly complex when it is conducted retroactively, under the fluorescent lights of the office and after the fog of war has dissipated. It is clear to the Commission that, especially with respect to the takeover of the *Mavi Marmara*, the IDF soldiers were required to make difficult, split-second decisions regarding the use of force, under conditions of uncertainty, surprise, pressure, and in darkness, with the perception of a real danger to their lives and with only partial information available to them. Further, in this situation, they were also aware of the fact that some of the IHH activists on board the *Mavi Marmara* were using firearms. These factors were taken into account when analyzing the force used during the takeover event. Further, in a limited number of cases, there was insufficient information to be able to reach a conclusion regarding the circumstances surrounding the use of force.

At the same time, to the extent possible, a proper assessment of the use of force requires meticulous analysis. To a certain extent, the Commission believes that it was able to analyze the soldiers' testimonies and draw conclusions regarding the majority of the events described by the soldiers. When the Commission could not reach a conclusion regarding the use of force with the tools at its disposal, this is stated.

239. After an in-depth analysis of all the material in its possession, the Commission drew the following conclusions regarding the use of force:

(a) The Commission examined 133 incidents in which force was used (including events when live fire was employed; firing less-lethal weapons; shooting as a deterrent; threatening with a weapon; using a Taser, and using physical force under certain circumstances), which were described by over 40 soldiers who fast-roped onto the *Mavi Marmara* from the helicopters or who testified about the takeover actions from the Morena speedboats. This number also includes a few incidents that were depicted on the available relevant magnetic media and that did not correspond to the soldiers' testimonies.

(b) The large number of uses of force is reflective of the decision to look at all uses of force by IDF soldiers; the large number of IHH activists who armed themselves to resist the capture of the ships attempting to breach the blockade; and the scope and scale of the violence offered by those activists. It should also be noted that the majority of the uses of force involved warning or deterring fire and less-lethal weapons. Of the total number of uses of force reported by the soldiers, 16 incidents of hitting the center of body ("center of mass") with rounds of live fire were reported.

(c) Overall, the IDF personnel acted professionally in the face of extensive and unanticipated violence. This included continuing to switch back and forth between less-lethal and lethal weapons in order to address the nature of the violence directed at them.

(d) The Commission found that 127 uses of force investigated appeared to be in conformity with international law. In an additional six cases, the Commission has concluded that it has insufficient information to be able to make a determination regarding the use of force. Three out of those six cases involved the use of live fire and three cases involved physical force; two incidents of kicking and one strike with the butt of a paintball gun.

(e) In five of the 127 cases, force appeared to be used against persons taking a direct part in hostilities; however, there was insufficient evidence to conclude that the force used was in accordance with law enforcement norms. In another five cases, the Commission concluded that force appeared to be used in accordance with law enforcement norms, but in two cases it was unable to determine whether the person against whom force was used was a direct participant in hostilities and in three cases, it was determined that force was used against civilians who were not considered direct participants.

Impact of the Planning and Organization of the Operation on the Use of Force

240. In both situations of armed conflict and law enforcement, an assessment of whether there was appropriate use of force by State armed forces should include looking broadly at all of the surrounding circumstances, including the planning and control of the operation.[947] Focusing on planning and organization is relevant not only to the question of overall liability, but it also reflects the reality that the actions of individual soldiers are in many cases directly impacted by the information they are provided, the training they receive, and the operational limitations resulting from planning decisions made higher up the chain of command. The analysis will now turn to some of these issues. In reviewing the planning and preparation for the operation, the Commission is particularly mindful of the danger of looking at a situation with the benefit of hindsight. Effective operational planning requires considerable experience and the need to make professional judgment calls based on the available information. In addition, a particular course of action may not be feasible for a wide range of reasons.

241. An operation designed to intercept a flotilla of six uncooperative ships on the high seas is complex. Air and naval forces had to be effectively coordinated. Further, the entire military operation, both during the operation and in the aftermath of the incident, had to be coordinated with the timely and professional provision of medical assistance and evacuation of both IDF and IHH injured persons.

242. The placement of senior commanders on scene, including the Commander of the Navy, demonstrated the seriousness with which this incident was viewed by the Israeli military. It also enhanced the situational awareness of the chain of command in order to help ensure timely and effective decision making as the incident unfolded. The use of the special unit "Masada" and other law enforcement units, and the coordination across Government in order to handle the large number of passengers, reflected the realization that post-interception treatment of these potentially uncooperative civilians was best left to forces specially trained for those types of operations.

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947 See *The McCann* case, supra note 809, at para. 150 ("In keeping with the importance of this provision [the right to life] in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination").

The decision to use the naval Special Forces unit, Shayetet 13, was in accordance with the normal international practice for naval operations even outside the context of armed conflict, particularly in light of the need for specialized training to board a moving vessel and for fast-roping onto the deck of a ship at night. Further, the training and exercises they underwent to familiarize themselves with less-lethal weapons and the graduated use of force as well as the "mental preparations" that they underwent ensured that they were well prepared for the mission of intercepting vessels with a large number of civilians on board.[948]

243. From the materials before the Commission, it appears that the Israeli authorities did not have a forewarning of the violent reception planned by the IHH. The inability to identify IHH intentions had a direct impact on the planning and implementation of the operation. However, the lack of appreciation of the threat was not exclusively the result of incomplete intelligence gathering. Throughout the planning process, whether looked at from a policy, operational, or legal perspective, the scenario of an organized force armed with lethal weapons actively resisting the boarding attempt appears not to have been considered. In part, this assumption appears to have resulted from anticipation that the participants in the flotilla were all peaceful civilians as was the case with previous flotillas on the same route.

While a certain level of violence was anticipated during the strategic discussions held prior to the operation, and the possibility that there might be firearms present was mentioned in these discussions,[949] government witnesses appearing before the Commission had difficulty identifying exactly what that meant in a practical sense at the time.[950] The planners of the operation seem not to have believed that the use of force would be necessary, except perhaps in isolated cases of soldiers acting in self-defense. Whether driven by a lack of information; confidence in the ability of the Special Forces and other Israeli units involved to handle any unanticipated situation; or a sense of "routine" that may have developed regarding these types of operations (although it was clearly understood that this flotilla was different and presented new challenges), the planning appeared to end with the assumption that any violence would occur at

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948 *Id.*, at para. 183 (where the court rejected allegation that the choice of personnel specially trained to combat terrorism mean that it was intended to kill the terrorists).

949 *Defense Minister's Open Door Testimony*, *supra* note 70, at 33-34; *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 33, 38.

950 *Open Door Testimony of the Director General of the Ministry of Foreign Affairs*, *supra* note 430, at 8; *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 10; *Defense Minister's Open Door Testimony*, *supra* note 70, at 30-33.

the extreme lower end of the conflict spectrum. This had a direct impact on operational tactics, the Rules of Engagement, and training before the operation.

244. In any event, from the soldiers' testimonies it is evident that the possibility of a violent confrontation, on one level or another, did not filter down during the planning process to the tactical level.[951] The soldiers almost universally indicated that they expected low levels of violence, perhaps involving some pushing and limited physical contact.[952] As a result, the soldiers were surprised to find themselves in a situation that they ultimately viewed as combat.[953]

245. However, in this context two additional factors must be emphasized: one, the presence of large numbers of civilians on the vessels limited the operational options. There was an understandable and strongly held view across Government that a use of force against the ships could not be justified on moral grounds. Second, the training and preparation of the soldiers leading up to the operation was very thorough, with a particular emphasis on the use of less-lethal weapons. For the soldiers, the default position was to use less-lethal weapons until an opposing threat forced the use of the lethal options. This preparation proved effective during the takeover of the other 5 flotilla vessels where the levels of violence generally met the planners' expectation.

246. In fact, the situation presented in this case is exactly the opposite of what occurred in the *McCann* case from the European Court of Human Rights, where British authorities were faulted for making assumptions that led to a sense of increased risk (i.e., not considering that their intelligence assessments that a car bombing was imminent might be wrong) and for employing soldiers who were trained to automatically use lethal force.[954]

In the present case, the risk was underappreciated and the limitations in the ROE with respect to the use of less-lethal weapons (range, areas of the body to be targeted, etc), while put in place to limit injury to civilians, proved very restrictive considering the situation faced by the soldiers that fast-roped to the *Mavi Marmara*. In this respect, the planning process has to account for possibilities that seem less likely, and include those

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951 *The Eiland Report*, *supra* note 402, at 62-63.

952 See the testimony of soldier no. 1, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1; Testimony of soldier no. 2, *Id.*, at 1; Testimony of soldier no. 4, *Id.*, at 1; Testimony of soldier no. 6, *Id.*, at 1; Testimony of soldier no. 8, *Id.*, at 1; Testimony of soldier no. 9, *Id.*, at 1; Testimony of soldier no. 10, *Id.*, at 1; Testimony of soldier no. 15, *Id.*, at 1.

953 See the testimony of soldier no.2, *Id.*, at 2; Testimony of soldier no. 9, *Id.*, at 1; Testimony of soldier no. 10, *Id.*, at 1; Testimony of soldier no. 15, *Id.*, at 1.

954 *The McCann* case, supra note 809, at para. 210-213.

scenarios in the preparation of the soldiers before the operation. While commanders rightly should be able to rely on the known capabilities of personnel under their command, it is evident that the soldiers were placed in a situation they were not completely prepared for and had not anticipated. The anticipation of and planning for "worst case" scenarios could have better prepared the soldiers for the situation to which they were exposed. In preparing exclusively for less violent scenarios, the danger from a legal perspective is that the soldiers might overreact when confronted with such unanticipated threats. However, and this should be emphasized, looking at the operation as a whole, that appears not to have happened, as the soldiers acted continually to distinguish the types of threat posed in different situations, and they even switched back and forth between lethal and less-lethal weapons to address those threats. This occurred also after it had become clear that the IHH activists were using firearms.

247. Questions regarding the adequacy of the planning also arise in reviewing the naval command, which identified a few options for the graduated use of force to stop the ships: the use of water hoses and malodorants. As outlined above, most of these methods were ultimately rejected by the military itself as impracticable. In that respect, it is not clear why the naval command was not drafted or amended to reflect the actual limited options that were available to board the ships. A clearer acknowledgement of these operational limitations during the preparation of the naval command might have forced consideration of other alternatives or different courses of action.

. Under the circumstances, at the time it became evident that boarding from the sea was going to be opposed, it was decided to order the soldiers to fast-rope onto the roof and seize the bridge. As it turned out, this placed the soldiers at an increased level of risk. When the resistance to the initial boarding from the Morena speedboats occurred, or when the rope was tied off when lowered from the first helicopter, another possible approach might have been to temporarily withdraw in order consider other options, including warning the captain of the *Mavi Marmara* and the IHH participants that deadly force would be used if violent opposition persisted. As has been noted, the technical means and operational doctrine for stopping vessels on the high seas, and particularly one the size of the *Mavi Marmara*, are quite limited. The large number of civilian passengers on board and the potential for collateral damage further increased the challenge. However, clear warnings and the controlled and isolated use of force may have helped avoid a wider and more violent confrontation such as the one that occurred. In this regard, the warnings

issued to the Gaza flotilla should be reviewed to determine whether they should more directly have indicated what action would be taken by Israeli authorities if resistance were to continue. Having an alternate plan when clear resistance was first shown (i.e. when it became evident that the IHH activists were in possession of weapons and violently opposed the boarding from the Morena speedboats) might have avoided the position of having to continue to land soldiers one by one into the midst of the waiting IHH activists.

However, the issuance of warnings would not necessarily have been feasible or effective. For example, warning shots intended to stop a ship may have limited effect, depending on a number of factors, including the weather, the state of the sea, and the available weapons. Further, warning shots can only be used when other ships or personnel will not be endangered. The presence of a large number of vessels taking part in this incident is therefore a significant complicating factor.[955]

248. While the Commission has commented on the planning and organization of the mission, this critique should not be interpreted to mean that the actual plan as developed by the Israeli military or the organization of the mission led to a systemic misapplication of force by the soldiers involved or a breach of international law.

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955 See Allen, *Limits on the Use of Force*, *supra* note 337, at 87 (indicating when describing the United States Coast Guard approach to using warning shots and disabling fire in a law enforcement scenario: "[w]arning shots are only used after other signaling methods have been tried without success. Warning shots are not used against aircraft or under circumstances where their use might endanger any person or property. Generally, warning shots are not used unless the enforcement units have the capability to deliver disabling fire if the warning shots are ignored. Disabling fire is the firing of ordnance at a vessel with the intent to disable it, with minimum injury to personnel or damage to the vessel. Under the CGUFP [Coast Guard Use of Force Policy], disabling fire is to be discontinued when the vessel stops, is disabled, enters the territorial sea of another State, or the situation changes in a manner that introduces substantial risk to those aboard the noncompliant vessel").

An AHernative Perspective: Analysis of the Opening Actions Under Law Enforcment Norms

249. It would be worthwhile to examine the influence of the tactics that were applied by the IDF at the opening stages of the capture of the Marmara, on the compatibility of the operation with the requirements of necessity and proportionality, according to the Law Enforcement norms. The issue to be discussed is whether it would be possible to argue that the initial choice of the IDF to apply unaggressive steps in order to capture the ship (due to lack of information concerning the anticipated intensity of the resistance to the capture) actually led to a more severe damage than this which would have occurred, if more aggressive measures, to some extent, had been taken in the first place.

250. As described above, the initial step of the operation included an attempt to climb on to the ship from one of the Morena, without using increased force. In the course of this initial stage, the IDF used only "soft" measures in order to capture the ship, in response to the violence demonstrated by the IHH activists. The forces on the boat preferred to temporarily retreat, instead of using lethal weapon or severe non-lethal ones. In addition, the soldiers rappelled from the helicopter although ensure facilitated by violent means the access of the soldiers to the ship. At this stage only "flash bang" grenades, which did not pose any threat to the participants' lives, were used.

Only subsequently to the fact that the IHH group severely and cruelly attacked the first soldier who had climbed down to the ship, and by this escalated the confrontation, the soldiers found themselves compelled to use a higher degree of force.

251. The initial tactics which have been implemented by the IDF posed only a minimal threat upon the participants, while they imposed an increased risk upon the Israeli soldiers, in particular regarding to these who participated in the fast-rope maneuver. As aforementioned, it should be emphasized that the IDF soldiers have initially used only non-lethal weapons in a very moderate mode, notwithstanding the substantial violence applied by the flotilla participants. These acts optimally fulfilled by themselves the requirements of necessity and proportionality according to the international human rights law. As much as the necessity test is concerned, the participants did not suffer any damage during the opening stage at stake and therefore there is no need to examine whether any other tactics which could have caused a lesser damage had been available at this time. As much as the necessity test (in its narrow sense) is concerned,

given the fact that no damage has been caused within the opening stage of the operation, the balancing between the operational advantage and the damage been inflicted leads necessarily to the conclusion that the proportionality requirement has been fulfilled at this stage.

Indeed, the escalation started only after the aforementioned initial step of the operation. One may contend that the escalation could have been prevented if a more vigorous tactic would have been implemented against the participants in the flotilla (for example, by creating a "sterile zone", using means like skunk bombs. It should therefore be examined whether the IDF was under any obligation according to the international law to use any more aggressive initial steps than these been applied, in order to prevent the escalation which subsequently occurred, leading to the necessity of using lethal weapons.

252. It seems that a negative answer should be given to the aforementioned question. At first, it is entire doubtful whether the implementation of more aggressive tactics at the beginning of the operation could indeed have lessen the damage caused to the participants of the flotilla, given the fact that the IHH participants were certainly determined to generate a violent confrontation. At the same time, there is a reasonable basis to assume that more aggressive steps could have lessen the risk and the injuries among the IDF soldiers (an aspect which does not have any implications in relation to the international law obligations but rather only concerning the Israeli internal context).

253. Secondly, the requirements of necessity and proportionality should be considered according to the information which was available, or should have been available, to the operational forces at the time of the operation. While implementing these requirements, special weight should be given to the subjective aspect (the good faith issue) and to the ex ante point of view, as opposed to the ex facto perspective. At the opening stage of the operation, the information available to the IDF was that no substantial violent opposition was likely to evolve. The subsequent escalation occurred within a tense and violent situation, which involved decisions been immediately taken. We have already mentioned that in the context of violent confrontations, soldiers have frequently only partial information, which later on, in an ex post perspective, may be proved as being unreliable under the circumstances.

We aforementioned that both the political and the military decision makers have acted in good faith, while taking into consideration the obligations of Israel under the international law during the preparation stages, as well as within the operation itself. Giving appropriate weight

to Israel's obligations also fitted the general interest of Israel to avoid international delegitimization and damage to Israel's image.

254. In conclusion, the initial stage of the operation, until the first soldier climbed down to the Marmara, as well as the other abovementioned stages, had been conducted according to the international law. Indeed, looking at this issue through an ex post perspective, the non-aggressive tactics applied by the IDF at this stage, provided the IHH participants with the opportunity to create a violent and high profile confrontation, generating an escalation which involved the use of firearms and non-lethal weapons. Notwithstanding the aforesaid, the decision of Israel to implement a non-violent approach at the initial stage of the operation did not violate in any sense its obligations under the international law. A country does not violate the international law where it acts in a "soft" mode, hoping that the lawbreakers do not escalate the situation. The willingness to provide a prospect of conducting and concluding an operation without any violence at all should not be credited against the enforcing country. The violence which had been used by the IHH group served as the decisive factor leading to the escalation of violence within the operation.

Chapter B: Conclusions

255. The Commission has reached the following conclusions:

- A vessel that attempts to breach a blockade is subject to international law governing the conduct of hostilities: international humanitarian law, including the rules governing use of force.
- The Israeli armed forces' interception and capture of the Gaza Flotilla vessels in international waters - seaward of the blockaded area - was in conformity with customary international humanitarian law.
- The tactics chosen to intercept and capture the Flotilla vessels -including having Shayetet 13 naval commandoes board from Morena speedboats and fast-rope from helicopter onto the roof of the vessels - was consistent with established international naval practice.
- The participants in the Flotilla were predominantly an international group of civilians whose main goal was to bring publicity to the humanitarian situation in Gaza by attempting to breach the blockade imposed by Israel.
- On board the *Mavi Marmara* and the other flotilla vessels was a group of IHH and affiliated activists (the "IHH activists") that violently opposed the Israeli boarding. The IHH activists who participated in that violence were civilians taking a direct part in hostilities.
- The force used against civilians on board the flotilla was governed by the principles of "necessity" and use of "proportionate force" associated with human rights based law enforcement norms. However, the IHH activists lost the protection of their civilian status for such time as they directly participated in the hostilities. The use of force against these direct participants in hostilities is governed by the applicable rules of international humanitarian law.
- The Rules of Engagement for the operation provided an authority to use force that reflected the nature of a law enforcement operation.
- The IHH activists carried out the violence on board the *Mavi Marmara* by arming themselves with a wide array of weapons, including iron bars, axes, clubs, slingshots, knives, and metal objects. These were weapons capable of causing death or serious injury. Further, the hostilities were conducted in an organized manner with IHH activists, *inter alia*, operating in groups when violently assaulting the IDF soldiers.

- The IHH activists used firearms against the IDF soldiers during the hostilities.
- The Commission has examined 133 incidents in which force was used. The majority of the uses of force involved warning or deterring fire and less-lethal weapons.
- Overall, the IDF personnel acted professionally in the face of extensive and unanticipated violence. This included continuing to switch back and forth between less-lethal and lethal weapons in order to address the nature of the violence directed at them.
- The Commission has concluded that in 127 cases, the use of force appeared to be in conformity with international law.
- In six cases, the Commission has concluded that it has insufficient information to be able to make a determination.
- Three out of those six cases involved the use of live fire and three cases involved physical force; two incidents of kicking and one strike with the butt of a gun.
- In five out of the 127 incidents that appeared to be in conformity with international law, there was insufficient evidence to conclude that the use of force was also in accordance with law enforcement norms. However, in these cases, force appeared to be used against persons taking a direct part in hostilities and, as a consequence, was in conformity with international law.
- The planning and organization of the IDF mission to enforce the blockade did not include anticipation that there would be a violent opposition to the boarding, which had a direct impact on the operational tactics, Rules of Engagement, and training before the operation. However, the focus of the planning and organization of the operation on a lower level of resistance did not lead to a breach of international law.

Concluding Remarks

Today, approximately five months after hearing the first testimonies, the Commission is completing this part of its work by submitting this report to the Government of Israel. For whom was the report written? It was written, of course, for the Government of Israel, but also for military personnel and jurists studying international humanitarian law, who may, perhaps, use it in the future for guidance and instruction; for the public, who in all the confusion of information wishes to know what happened; and for ourselves, who sought with all our abilities to arrive at the truth.

After a journey full of obstacles and pitfalls, and after exhaustive investigations, inquiries, studies and discussions, we unanimously and wholeheartedly summarize our conclusions:

The naval blockade imposed on the Gaza Strip - in view of the security circumstances and Israel's efforts to comply with its humanitarian obligations - was legal pursuant to the rules of international law.

The actions carried out by Israel on May 31, 2010, to enforce the naval blockade had the regrettable consequences of the loss of human life and physical injuries. Nonetheless, and despite the limited number of uses of force for which we could not reach a conclusion, the actions taken were found to be legal pursuant to the rules of international law.

'Now all has been heard, here is the conclusion of the matter.'

Justice Emeritus Jacob Türkel
Chairman of the commission

Ambassador Reuven Merhav
Member of the commission

Major-General (res.) Amos Horev
Member of the commission

Prof. Miguel Deutch
Member of the commission

Lord David Trimble
Observer

Brigadier-General (ret.) Kenneth Watkin
Observer

Annexes

Annex A: **List of Witnesses Appearing Before the Commission, the Dates and Classifications of their Testimonies**

Annex B: **Map of Gaza and the land border crossings**

Annex C: **Notice to Marines Aug. 2008**

Annex D: **Map of the blockaded area**

Annex E: **List of Goods on Flotilla Vessels**

Annex F: **Map of the area where the takeovers of the flotilla took place**

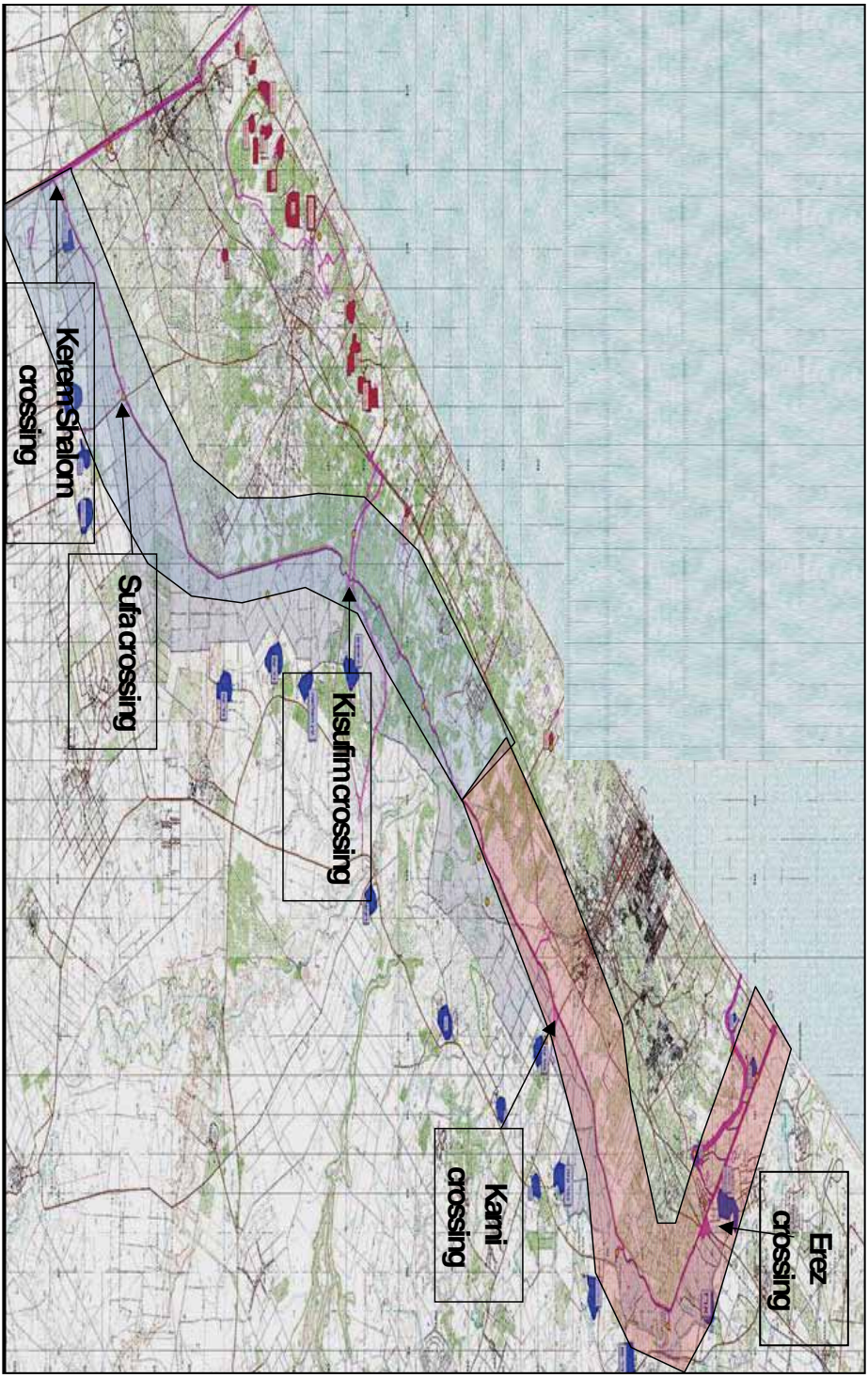
Annex G: **Drawing of the Main Marmara**

Annex A: the List of Witnesses Appearing Before the Commission, the Dates and Classifications of their Testimonies

Date	Public testimony	Closed door testimony
28.6.10	Opening meeting	
9.8.10	Prime Minister, Mr. Benjamin Netanyahu	Prime Minister, Mr. Benjamin Netanyahu
10.8.10	Defense Minister, Ehud Barak	Defense Minister, Ehud Barak
11.8.10	IDF Chief of Staff Lt. Gen. Gaby Ashkenazi	IDF Chief of Staff Lt. Gen. Gaby Ashkenazi
24.8.10		Maj. Gen. (ret.) Giora Eiland, Chair the IDF General Staff Expert Inquiry Team [meeting]
26.8.10	Maj. Gen Avichai Mendelblit, IDF Chief Military Advocate General	Maj. Gen Avichai Mendelblit, IDF Chief Military Advocate General
31.8.10	Maj.-Gen. Eitan Dangot, Coordinator of Government Activities in the Territories	Maj.-Gen. Eitan Dangot, Coordinator of Government Activities in the Territories
13.9.10		Dr. Uzi Arad, Chairman of the Israeli National Security Council and the Prime Minister's National Security Advisor
14.9.10		Mr. Meir Dagan, Director of the Mossad
15.9.10	Mr. Yossi Gal, Director General of the Ministry of Foreign Affairs	Mr. Yossi Gal, Director General of the Ministry of Foreign Affairs
12.10.10	Mr. Yossi Edelstein, Head of the Enforcement and Foreigners Division of the Population and Immigration Authority	

12.10.10	Lt. Gen Benny Kaniak, Commander of the Prison Service	
13.10.10	B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories, Ms. Jessica Montel, and Mr. Eyal Hareuveni.	
13.10.10	Doctors for Human Rights, Prof. Tzvi Bentowitz, Mr. Ran Yaron, and Dr. Mustafa Yassin.	
13.10.10	Gisha: The Legal Center for Freedom of Movement, Ms. Tamar Feldman	
24.10.10	IDF Chief of Staff Lt. Gen. Gaby Ashkenazi	IDF Chief of Staff Lt. Gen. Gaby Ashkenazi
25.10.10	MK Tzipi Livni, Leader of the Opposition	MK Tzipi Livni, Leader of the Opposition
25.10	Sheikh Mr. Hamad Abu Dabus	
25.10	Mr. Muhammad Zidan	

Annex B: **Map of Gaza and the land border crossings**



Annex C: **Notice to Marines Aug. 2008**

NO. 6/2008 All mariners be advised

Wednesday, 13 August 2008 00:00

No. 6 / 2008 13 August, 2008

All mariners be advised:

Please not the following notice from the Israeli Navy:

1. The Israeli Navy is operating in the maritime zone off the coast of the Gaza Strip. In light of the security situation, all foreign vessels are advised to remain clear of area A in the attached map. Bound by the following coordinates:

	E	N
1.	34.10.02	31.46.08
2.	33.56.41	31.33.48
3.	34.29.28	31.35.42
4.	34.13.06	31.19.23

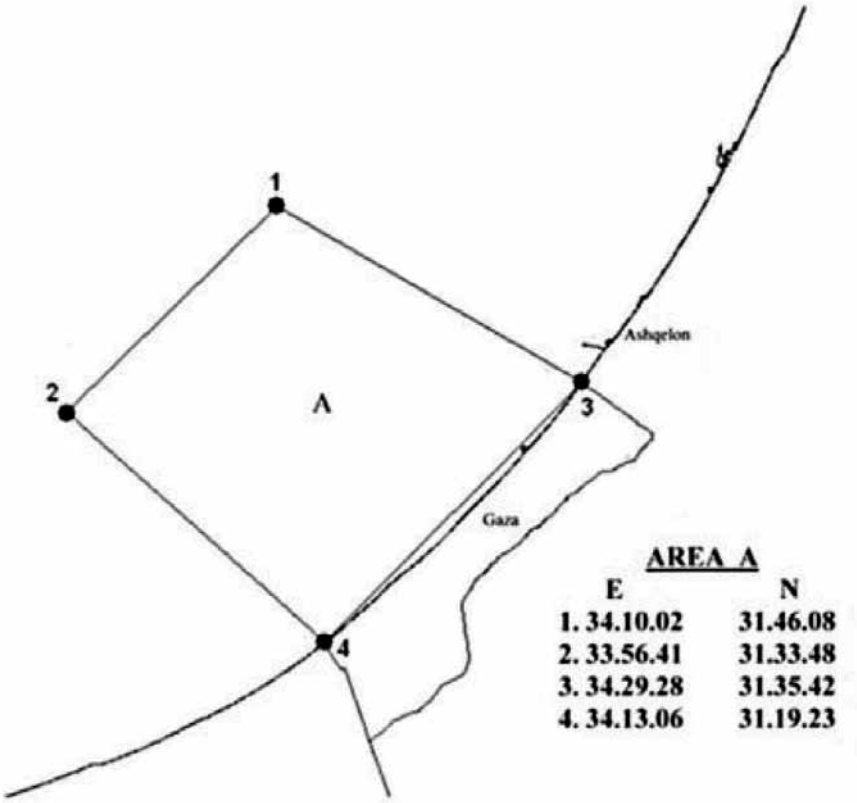
   Delivery of humanitarian supplies to the civilian population in the Gaza Strip is permitted through the land crossings between Israel and the Gaza Strip, subject to prior coordination with the Israeli Authorities.

2. Vessels approaching the maritime zone off the coast of the Gaza Strip are requested to maintain radio contact with Israel Naval Forces on channel 16 and will be subject to supervision and inspection.

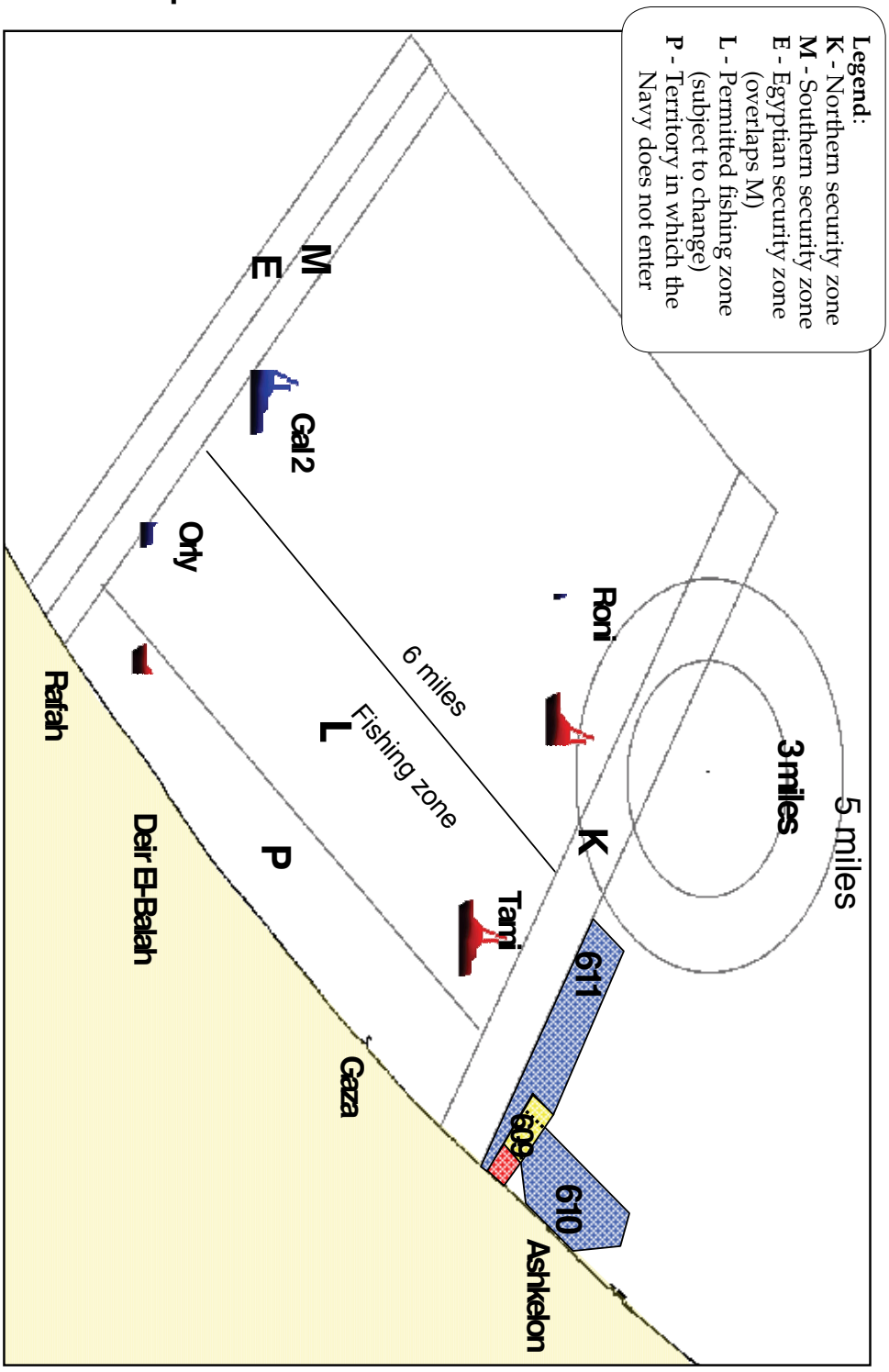
3. In accordance with the agreements between israel and the Palestinian Authority, entry of foreign vessels to the maritime zone adjacent to the Gaza Strip is prohibited due to the security situation and in light of these agreements, foreign vessels are barred from such entry.

4. This notice is published in order to ensure safe navigation and to prevent vessles from approaching areas in which their safety may be endangered due to the security situation in those areas.

ADVISORY NOTICE (MARITIME ZONE OFF THE COAST OF GAZA STRIP)
AUG. 11, 2008



Annex D: **Map of the blockaded area**



Annex E: **List of Goods on Flotilla Vessels**

Below is a list of all the goods unloaded from the flotilla's vessels.

The "SOFIA":

No.	Type of Goods	Amount of Cargo
1	Electric scooters	143 units
2	Electric wheel chairs	128 units
3	Batteries	198 unit
4	Walls for movable structures	197 pallets
5	Fiberglass	10 pallets
6	Medical equipment	234 boxes
7	Rubber boats (rescue)	1 unit
8	Roof constructions	34 batches of 12 units – 400 units total
9	Gallons of paint	89 gallons
10	Scattered cardboard boxes	117 boxes
11	Work tools and ladders	164 items
12	Ceramic flooring	35 pallets
13	Lumber	17 pallets
14	Wooden profiles	167 units
15	Toys	17 boxes
16	Boxes of clothing	131 boxes
17	School bags	7 boxes
18	Pipes	10 pallets
19	Desalination device	2 containers
20	Metal sheets	9 pallets
21	Generator	I unit
22	Tents	19 units
23	Tent gear	35 packages
24	Water containers	3 pallets

The "DEFNEY":

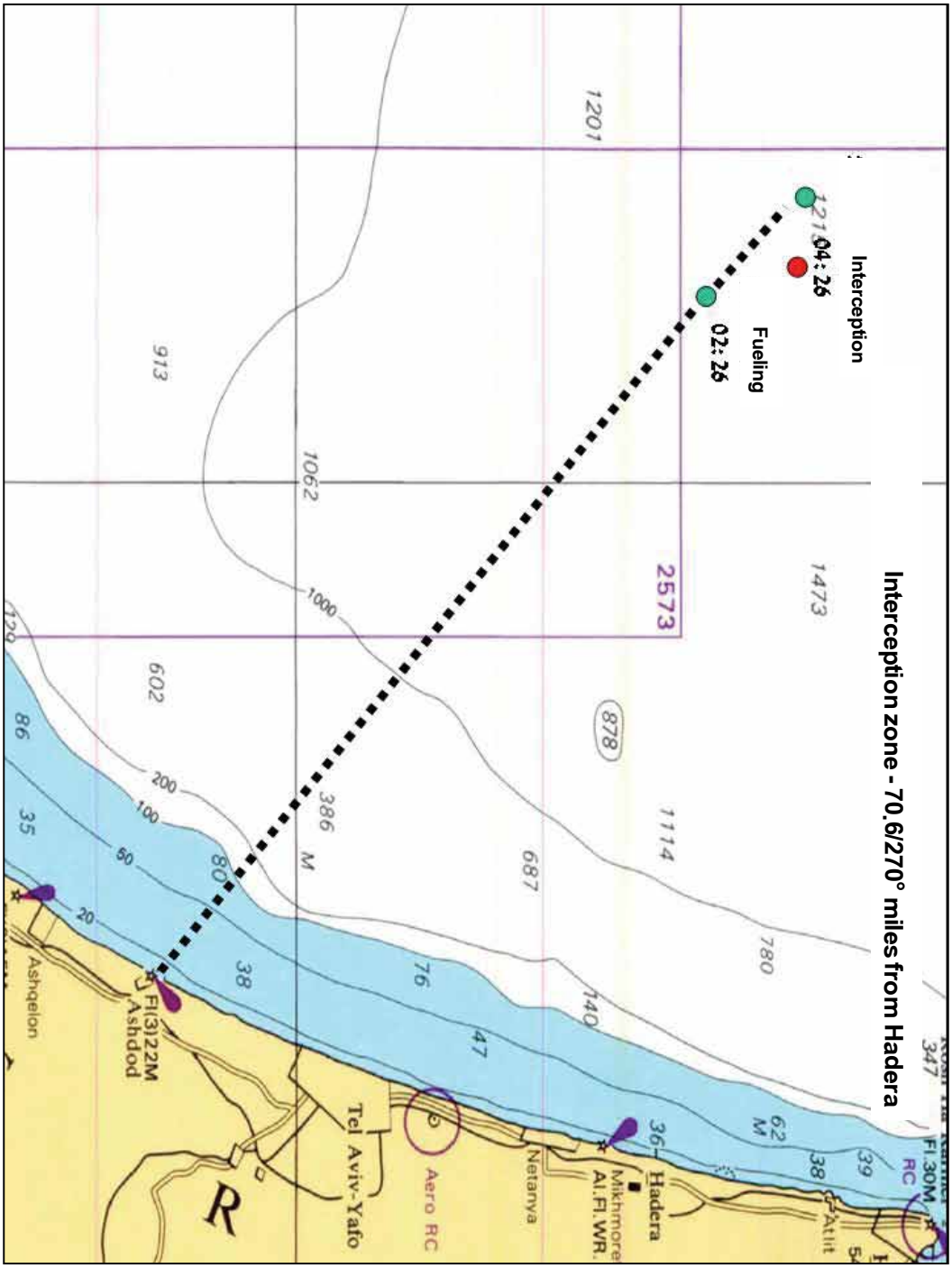
No.	Type of Goods	Amount of Cargo
1	Wheel chairs	138 units
2	Boxes of clothing	463 boxes
3	Scattered equipment	38 boxes
4	Electric tools	287 boxes
5	Medical equipment	2084 boxes / items
6	Toys	770 boxes
7	Generators	65 units
8	Cardboard boxes	9 units
9	Gallons of paint	121 gallons
10	Scattered cardboard boxes	117 cartons
11	Work tools and ladders	149 items
12	Ceramic flooring	61 pallets
13	Raw materials for building	858 boxes
14	Lumber	11 pallets
15	Constructions for structures	978 pallets
16	Drywall	6 pallets
17	Pipes	21 pallets
18	Windows	2 pallets
19	Electronic gear	23 pallets
20	Food	49 pallets
21	Bathroom fixtures	181 pallets
22	Beds	85 pallets
23	School gear	77 pallets
24	Boxes with building equipment / structures	164 cartons
25	Carpets	97 pallets
26	Industrial fabric	165 units
27	Work tools	105 units
28	Plastic for industry (profiles)	34 units

29	Blankets	176 pallets
30	Sewing machines	12 units
31	Electric cables	645 pallets
32	Floor tiles	18 pallets
33	Metal	15 pallets
34	Metal plates	63 pallets
35	Metal profiles	104 units

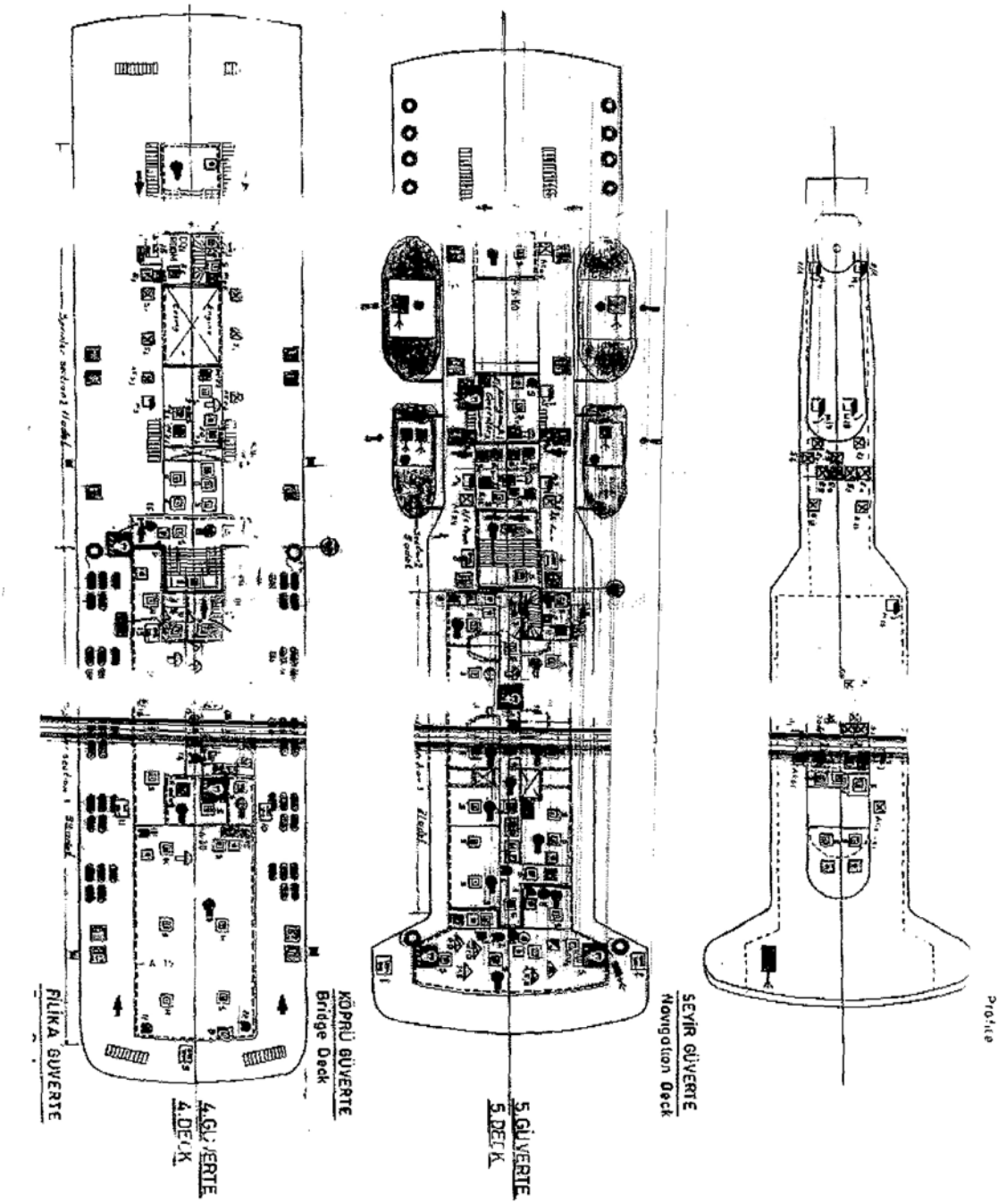
The "GAZZE":

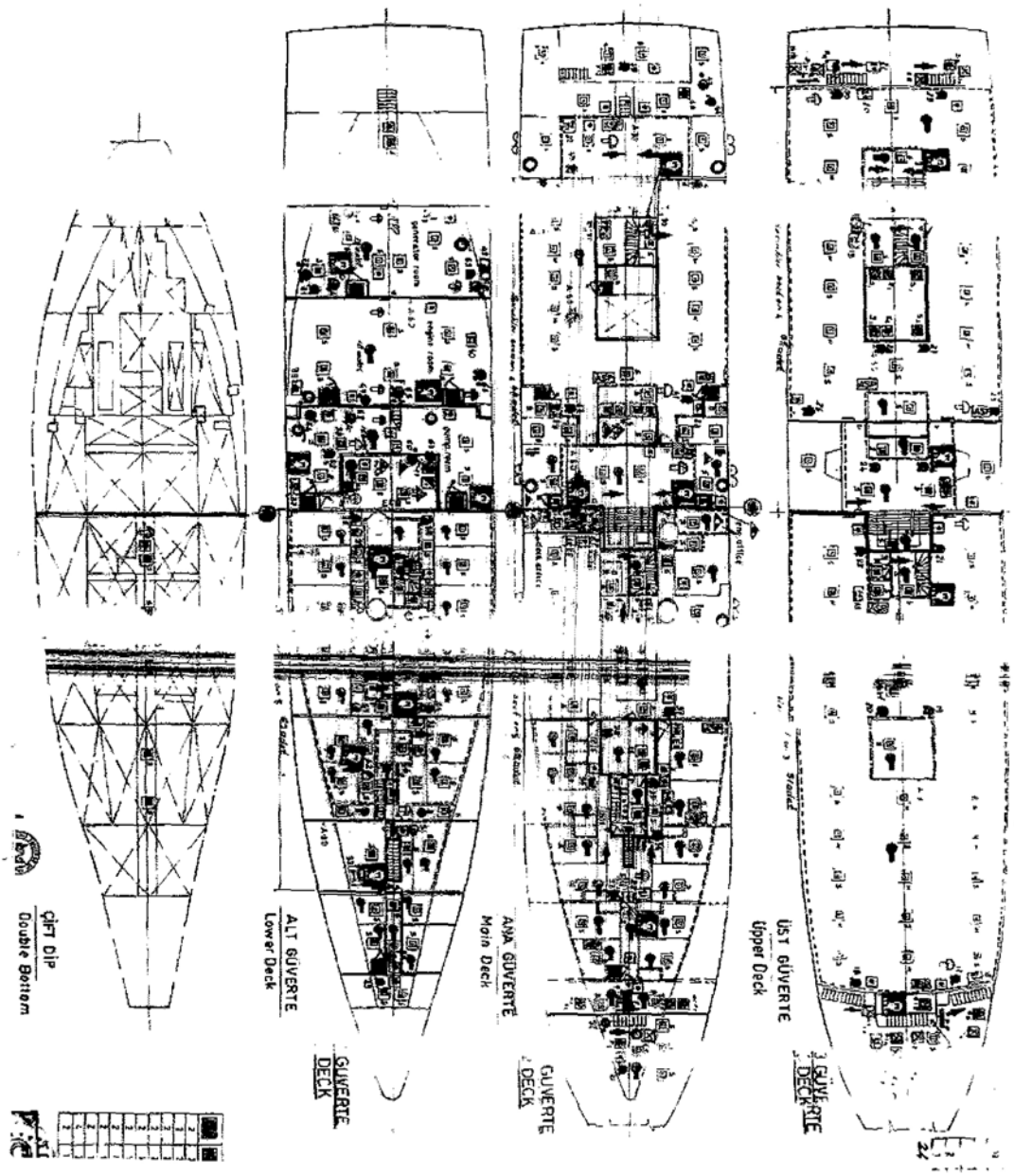
No.	Type of Goods	Amount of Cargo
1	Concrete "Bales"	1358 units
2	Metal bars	304 units

Annex F: Map of the area where the takeovers of the flotilla took place



Annex G: **Drawing of the Main Marmara**




ÇİFT DİP
Double Bottom
ALT GÜVERTE
Lower Deck
GÜVERTE
DECK
ANA GÜVERTE
Main Deck
GÜVERTE
DECK
ÜST GÜVERTE
Upper Deck
GÜVERTE
DECK

Supreme Court Justice (Ret.)
Jacob Turkel, Chairman

Ambassador Professor
Shabtai Rosenne
(Deceased 21.9.10), Member

General (Ret.) Amos Horev,
Member

Ambassador Reuven Merhav,
Member

Professor Miguel Deutch,
Member

Lord David Trimble,
Observer

Brigadier General (Ret.)
Kenneth Watkin, Q.C., Observer

Advocate Hoshea Gottlieb,
Commission's Coordinator

Prof. Dr. Wolff Heintschel von Heinegg,
Special Consultant

Prof Michael Schmitt,
Special Consultant

Produced by Government Printing Israel

The Public Commission to Examine the Maritime Incident of 31 May 2010

Second Report – The Turkel Commission

Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law

The Public Commission to Examine the Maritime Incident of 31 May 2010

The Turkel Commission

Second Report

Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law

February 2013

Table of Content

Observer Letter – Rt. Hon. David, Lord trimble 21

Observer Letter – Brigadier–General (ret.) Kenneth Watkin, Q.C. 24

Observer Letter – Professor Timothy LH McCormack 27

Preface to the Second Report 31

Introduction 33

The Background to the Formation of the Commission and the Government Resolutions 33

Members of the Turkel Commission, Advisers to the Commission and the Professional Staff 36

The Commission's Second Report 39

The Commission's Methodology 41

The Comparative Survey 43

The Sample Examination 45

The Structure of the Report 46

The Commission's Main Conclusions and Recommendations 49

Chapter A: The Normative Framework in International Law for the Duty to Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law

Introduction 52

A. Background 53

1. International Humanitarian Law 55

2. International Human Rights Law 61

The Interaction Between International Humanitarian Law and International Human Rights Law 64

3. International Criminal Law 70

4. Law of State Responsibility 71

B. Sources of the Duty to Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law ('Why Investigate?') 73

1. The Source of the Obligation in International Humanitarian Law 73

A. Examine 74

B. Investigate 75

The Obligations of Military Commanders and Other Superiors 77

Examination and Investigation During Non–International Armed Conflict 79

2. The Source of the Obligation in International Human Rights Law 82

3. The Source of the Obligation in International Criminal Law 85

4. The Source of the Obligation in the Law of State Responsibility 92

Summary of the Various Sources of the Duty to Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law 93

C. Violations of International Humanitarian Law that Require Examination or Investigation ('What to Investigate?') 94

D. The Grounds for Carrying Out the Obligation to Examine and Investigate ('When to Investigate?') 100

The Duty to Investigate in the Context of an Armed Conflict 101

Fact–Finding Assessment 102

The Duty to Investigate in a Law Enforcement Context 103

The Duty to Investigate Law Enforcement Activity in Armed Conflict 104

The Duty to Investigate in Occupied Territory 107

E. Method of Conducting an Examination and an Investigation ('How to Investigate?') 112

Examination 112

Investigation 112

The Requirements for Conducting an 'Effective Investigation' 114

The General Principles 118

1. Independence 118

2. Impartiality 125

3. Effectiveness and Thoroughness 127

4. Promptness 132

5. Transparency 134

Summary of the General Principles 135

Application of the General Principles to Investigations in the Context of an Armed Conflict 138

1. Independence and Impartiality 140

2. Effectiveness and Thoroughness 141

3. Promptness 143

4. Transparency 145

Summary of the General Principles in the Context of an Armed Conflict 146

Fact–Finding Assessment 147

Summary 149

Chapter B: Comparative Survey of Investigative Systems Relevant to Laws of Armed Conflict

Introduction 152

Purposes of the Comparative Survey 153

Methodology of the Comparative Survey 155

Evolutions in Law and Practice in the Countries Surveyed 157

A. Normative Framework ('Why and What to Investigate?') 159

Applicable International Law 159

Law of Armed Conflict 159

International Human Rights Law 160

International Criminal Law 162

Applicable Domestic Law 162

Specific Provisions Relating to War Crimes and Violations of the Law of Armed Conflict 164

General Criminal Law, Codes of Military Conduct and Charging Practices 168

United States 169

Canada 171

Australia 172

United Kingdom 173

Germany 174

Netherlands 175

B. The Mechanisms that Examine and Investigate Complaints and Claims of Violations of the Laws of Armed Conflict ('Who Investigates?') 177

Relationship Between Civilian and Military Justice Systems 177

United States

Military Justice System 180

Civilian Justice System 183

Canada

Military Justice System 184

Civilian Justice System 188

Australia

Military Justice System 188

Civilian Justice System 191

United Kingdom

Military Justice System 192

Civilian Justice System 195

Germany

Civilian Justice System 195

Netherlands

Civilian Justice System 197

C. Processes of Investigation and Subsequent Proceedings ('When and How to Investigate?') 204

United States: Routine Processes

When to Report and Investigate 204

How to Investigate: Routine Processes 207

1. Operational Reviews 208

2. Administrative Investigations 209

2.A. 'Preliminary Inquiry' 209

2.B. 'Formal Investigation by Command Investigation' 211

3. Criminal Investigation – MCIO Investigation 212

4. Pre–Trial Investigation 213

Occasional and Ad Hoc Investigative Mechanisms 214

Proceedings Following Investigation 214

Canada

When to Report and Investigate: Routine Processes 216

How to Investigate: Routine Processes 219

Administrative Investigations 219

Routine Investigations in Cases of Civilian Death 221

Disciplinary Investigations 221

Occasional and Ad Hoc Investigative Mechanisms 222

Proceedings Following Investigation 223

Australia

When to Report and Investigate: Routine Processes 226

'Quick Assessment' 228

How to Investigate: Routine Processes 229

'Full Administrative Inquiry' 230

Criminal Investigation 231

Occasional and Ad Hoc Investigative Mechanisms 233

Proceedings Following Investigation 234

United Kingdom

When to Report and Investigate: Routine Processes 235

How to Investigate: Routine Processes 236

Service Offenses Investigation 236

Criminal Investigation 236

Occasional and Ad Hoc Investigative Mechanisms 238

Proceedings Following Investigation 240

Germany

When to Report and Investigate: Routine Processes 241

How to investigate: Routine Processes 242

Malfeasance Investigation 242

Routine Investigation in Cases of Civilian Death 243

Criminal Investigation 243

Occasional and Ad Hoc Investigative Mechanisms 244

Proceedings Following Investigation 244

Netherlands

When to Report and Investigate: Routine Processes 245

How to Investigate: Routine Processes 247

Internal Investigation 247

'Fuller Factual Investigation' 248

Criminal Investigation 248

Occasional and Ad Hoc Investigative Mechanisms 249

Proceedings Following Investigation 250

D. Key Points Emerging From The Comparative Survey 251

What to Investigate? 251

When to Investigate? 252

Who Investigates? 258

How to Investigate? 261

Concluding Comments 264

Chapter C: The Examination and Investigation Mechanisms in Israel Concerning Complaints and Claims of Violations of International Humanitarian Law

Introduction 266

A. Sources of the Normative Basis of the Duty to Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law in Israel ('Why Investigate?') 268

B. The Normative Provisions in Israel that Define the Violations of International Humanitarian Law that Require Examination and Investigation ('What to Investigate?') 273

War Crimes 273

Responsibility of Commanders and Civilian Superiors 277

C. The Mechanisms in Israel that Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law ('Who Investigates?') 278

Complaints and Claims Directed at IDF Soldiers 278

1. The Military Advocate–General Corps 279

A. The Law Enforcement System 283

B. The Legal Advice System 287

C. The Training and Research System 289

2. The Military Police Criminal Investigation Department 291

3. The Courts Martial 295

Complaints and Claims Directed at Police Officers 298

1. The Police Internal Investigations Department 298

2. The Judea and Samaria Police District 302

Complaints and Claims Directed at ISA Personnel 304

Complaints and Claims Directed at Prison Wardens 307

Complaints and Claims Directed at the Civilian Echelon 308

1. State Commission of Inquiry 309

2. Government Commission of Examination 310

3. Commission of Assessment 311

4. Parliamentary Committee of Inquiry 312

Oversight and Review of Investigative Bodies 313

1. Oversight 313

Oversight of the Military System 314

2. Review 315

A. The Attorney–General (in his Role as Chief Prosecutor) 315

B. The Supreme Court 316

D. The Grounds that Give Rise to an Obligation to Investigate in Israel ('When to Investigate?') 319

The Grounds that Give Rise to an Obligation to Investigate in the IDF 319

1. Investigation Policy 319

2. Reporting Procedures 323

The Grounds that Give Rise to an Obligation to Investigate in the Police 326

1. Investigation Policy 326

2. Reporting Procedures 327

The Grounds that Give Rise to an Obligation to Investigate in the PIID and the NPWIU 328

1. Investigation Policy 328

2. Reporting Procedures 329

A. The Police Internal Investigation Department (PIID) 329

B. The National Prison Wardens Investigation Unit (NPWIU) 329

The Grounds that Give Rise to an Obligation to Investigate ISA Interrogators 333

1. Investigation Policy 333

2. Reporting Procedures 333

E. Method of Conducting the Examination and Investigation in Israel ('How to Investigate?') 335

Method of Conducting the Examination and Investigation in the IDF 335

1. The Operational Debrief 336

2. The Experts Debrief 339

3. Decisions Based on the Operational Debrief 340

4. CID Investigations 341

Method of Conducting the Examination and Investigation in the Police 346

1. The Police Operational Debrief 346

2. Decisions Based on the Police Operational Debrief 347

3. Police Investigations 349

Method of Conducting the Examination and Investigation by the PIID 351

Method of Conducting the Examination and Investigation by the Mavtan 353

Method of Conducting the Examination and Investigation by the NPWIU 354

Method of Conducting the Examination and Investigation by Commissions of Inquiry 355

1. State Commissions of Inquiry 355

2. Government Commission of Examination 357

3. Commission of Assessment 358

CHAPTER D: DO THE EXAMINATION AND INVESTIGATION MECHANISMS IN ISRAEL CONCERNING COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW CONFORM TO ISRAEL'S OBLIGATIONS UNDER INTERNATIONAL LAW?

Introduction 360

A. The Normative Provisions in Israel that Define the Violations of International Humanitarian Law that Require Examination and Investigation ('What to Investigate?') 362

Recommendation No. 1: 'War Crimes' Legislation 362

Filling Gaps in Israeli Legislation 365

Recommendation No. 2: Responsibility of Military Commanders and Civilian Superiors 366

A. Filling Gaps in Israeli Legislation 368

B. Investigation of Commanders 368

B. The Grounds for Carrying Out the Obligation to Examine and Investigate ('When to Investigate?') 370

Recommendation No. 3: Reporting Duties 370

A. Assimilating Reporting Procedures 374

B. Documentation of the Scene 375

Recommendation No. 4: Grounds Giving Rise to an Obligation to Examine and Investigate 375

The Investigation Policy in the IDF 377

C. Method of Conducting the Examination and Investigation ('How to Investigate?') 378

IDF Proceedings Prior to an Investigation

Recommendation No. 5: Fact–Finding Assessment 378

A. Fact–Finding Assessment 382

B. Limited Investigation within the Fact–Finding Assessment 384

Recommendation No. 6: The Decision on Whether to Open an Investigation 384

A. Timeframe 385

B. Duty to Provide Reasoning 386

C. Submitting Material to the Commanding Ranks 387

Conducting the Investigation

The Investigative Bodies 387

1. The Body that Investigates Complaints against IDF Soldiers 389

Recommendation No. 7: Independence of the MAG 389

A. Professional Subordination 391

B. The MAG's Appointment 392

C. The MAG's Tenure and Rank 392

Recommendation No. 8: The MAG's 'Dual Hat' 392

Appointment of the CMP 395

Recommendation No. 9: CID Investigations 396

CID for Operational Matters 397

Recommendation No. 10: Establishing the Investigation Timeframe 397

Establishing a Timeframe 399

Recommendation No. 11: Transparency of Proceedings 399

A. Victims' Rights 400

B. Documenting in a File 400

Oversight and Review of the MAG Corps 401

Recommendation No. 12: Oversight of the Legal Advice given by the MAG Corps 401

International Law Unit in the Ministry of Justice – Advice 402

Recommendation No. 13: Individual and Systemic Review of the Military Prosecution System 403

A. Individual Review – Appeal to the Attorney–General 408

B. Systemic Review – The Complaints Commission for the State Prosecution 408

2. The Body that Investigates Complaints against Police Officers 408

Recommendation No. 14: The Handling of Complaints against Police Officers 408

Examining and investigating Police activity under IDF command 412

3. The Body that Investigates Complaints against ISA Interrogators 413

Recommendation No. 15: The Handling of Complaints against ISA Interrogators 413

A. Transferring the Mavtan's role to the PIID 416

B. Documenting ISA Interrogations 417

4. The Body that Investigates Complaints against Wardens 417

Recommendation No. 16: The Handling of Complaints against Wardens 417

Training 418

5. The Body that Investigates Complaints against the Civilian Echelon 419

Recommendation No. 17: The Handling of Complaints against the Civilian Echelon 418

Commissions of Inquiry 421

Recommendation No. 18: Implementation of the Commission's Recommendations 422

A. MAG Guidelines 422

B. Implementation Team 422

Summary of the Conclusions and Recommendations 425

Chapter E: The Examination and Investigation of the Maritime Incident of 31 May 2010

Introduction 432

A. The Maritime Incident of 31 May 2010 – A Brief Summary 433

B. Description of the Examination and Investigation Proceedings Conducted in Israel 436

The Israeli Police Investigation into Offenses Committed by Flotilla Participants 436

The Examinations Conducted by the IDF 439

1. General Staff Experts Debrief 439

2. The MAG's Decision 440

Establishment of a Public Commission of Inquiry (the Turkel Commission) 441

Internal Examinations by Other Authorities 447

The State Comptroller's Probe 443

Supplementary Investigations Conducted by the MAG Following the Conclusions of the Various Commissions of Inquiry 445

C. Evaluation of the Examinations and Investigations That Were Conducted 447

What to Investigate? 447

When to Investigate? 449

1. The MAG's Decision Not to Open an Immediate CID Investigation After the Maritime Incident 449

2. Documentation of the Scene 451

How to Investigate? 454

1. The Eiland Report as a 'Fact–finding Assessment' Preceding the Decision on Whether to Open an Investigation 454

2. The MAG's Decisions after Submission of the Turkel Commission's First Report and the Palmer Report 459

Summary 462

CLOSING REMARKS 464

Annex A **List of the witnesses that appeared before the Commission and the Commission's Coordinator and the dates of their testimonies** 468

Annex B **The Sample Examination** 469

Annex C **The Comparative Survey** 475

The Questionnaire 476

The Country Reports

The US Report 485

The Canadian Report 563

The Australian Report 643

The UK Report 717

The German Report 801

The Netherlands Report 887

The Rt. Hon. David, Lord Trimble

As the Public Commission to Examine the Maritime incident of 31 May 2010 is now completing its remit by publishing its Second Report examining the question 'whether the examination and investigation process for complaints and allegations raised with regard to violations of the law of armed conflict … is consistent with the obligations of the State of Israel pursuant to the rules of international law', it is appropriate to reflect on my experience over the last 30 months as an international observer attached to the Commission.

The international observers, myself, Brigadier–General (ret.) Kenneth Watkin (until April 2011) and Professor Timothy McCormack (from April 2011 to date), had access to all materials and were fully involved in the Commission's work, participating in the testimony sessions, as is evident from the transcripts of those sessions, and participating actively in all the Commission meetings. Throughout the 30 months of the Commission's work not one meeting – internal, public or in camera – was convened without the participation of both observers. We did not have a vote in those meetings, but then the Chairman's patient pursuit of consensus meant that there were no votes. I am full of admiration of the way that our chairman, Supreme Court Justice Emeritus Jacob Turkel, guided the Commission through difficult and controversial issues to produce what I think are clearly balanced and fair reports. I also want to express my appreciation of the work of the Commission Coordinator, Advocate Hoshea Gottlieb in both his legal and administrative role. I particularly appreciate meetings with him to brief me on the preparation of the actual reports which facilitated an input to those reports.

As Kenneth Watkin has noted in his letter, international law on investigations and inquiries is complex and not entirely clear and it took

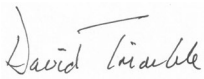
some time and the assistance of a number of experts for us to be able to state with some confidence just what the requirements of international law are. I think that this part of our Second Report will be a significant contribution to the development of this topic.

In terms of the Israeli examination and investigation mechanisms for alleged breaches of the laws of armed conflict, we did not limit ourselves to the military mechanisms only but assessed all the mechanisms (ISA – [Shin Bet], Israel Police, Israeli Prison Service and the political echelon). The Commission heard a wide array of parties – Government, Israeli human rights organizations and leading Israeli academics and a Palestinian family who spoke of the investigation process into the tragic loss of their child. This general area is of particular importance to me as a former academic lawyer and politician dealing sometimes with similar issues in my native land. I gave special attention to certain issues that are especially close to my heart and I appreciate that the Commission accepted an input both in terms of focus and emphasis.

Any reader of this Report will see that it is comprehensive and rigorous. It is independent. It reveals that, taken as a whole, Israeli law and practice will stand comparison with the best in the world, but there is always room for improvement and there is one area where, regrettably, a complaints procedure is ineffective. I am sure the Government and Knesset will want to deal comprehensively with that particular matter.

Finally, I want to thank all the members of the Commission and all those who have worked in and for it for their help and their friendship. I consider it a privilege to have been an observer to the Commission. I think I have benefitted enormously from the experience and have not regretted for one minute the time devoted to it. I have emerged with, I hope, a better understanding of the character of the peoples and the

difficulties and the opportunities they have in the clash between right and right in this, another, narrow ground.



Lord David Trimble

Brigadier–General (ret.) Kenneth Watkin, Q.C.

11 May, 2011

Since the submission of Part I of the Commission report in January, 2011, I have been honoured to continue to serve as an Observer to the Public Commission appointed to inquire into the maritime incident of 31 May 2010.

In turning its attention to the examination of whether the mechanism applied by Israel for the investigation of violations of the laws of armed conflict conforms with the rules of international law the Commission has embarked on an assessment of a complex but also essential area of law focused on accountability. The Commission has taken an appropriately broad view of its mandate looking at the accountability structure applicable to Israeli civilian as well as military security forces and decision makers.

It is important to note that the Commission has made considerable efforts to hear from a wide range of interested groups and individuals in addition to the Government witnesses. The Government officials who testified included the Attorney General, the Military Advocate General, the head of the ISA (GSS) and the Commander of the Military Police. It has again been particularly helpful to have the input of a number of Israeli human rights non–government organizations that provided a unique and important viewpoint on the investigation of alleged war crimes. One of those organizations arranged the appearance of Palestinian family members who testified about their perspective on the investigation process looking into the death of a deceased relative. That testimony provided a reminder of the human impact of such investigations.

The Commission also sought input from knowledgeable Israeli academics regarding not only their views of international law, but also

the Israeli process for conducting investigations. This effort to hear from a broad range of interested parties combined with the substantial written submissions provided to the Commission cannot help but enhance the comprehensiveness of the final Commission Report.

The Commission has continued to expend considerable effort to ensure that the Observers were provided with translations of the testimonies and written materials that were provided in Hebrew. The work of the translators during the testimony sessions has been impressive thereby permitting full engagement in the questioning process.

On a personal note I would like to thank Justice Turkel and all the Commission members for the collegial manner in which I was incorporated as a Foreign Observer into the Commission process. Throughout that process I have been provided complete access to witnesses and materials and have been fully involved by the Commission in its work.

I would also like to express my sincere appreciation to the exceptionally dedicated Commission Coordinator, Hoshea Gottlieb, who has been instrumental in facilitating not only my involvement as an Observer but also the overall work of the Commission. Further, I want to acknowledge the impressive legal work carried out by Moran Yahav who has worked tirelessly in assisting the Commission. No undertaking of this scope can be carried out without a dedicated administrative staff. Their efforts and the kindness demonstrated towards me are very much appreciated.

Finally, I am leaving the Commission before it has completed its work due to a prior commitment to become the Charles H. Stockton Professor of International Law at the United States Naval War College, Newport, Rhode Island. Having submitted my letter withdrawing as a Foreign Observer effective 15 April 2011 I depart the Commission with

a full understanding and appreciation of the unique role that I have been privileged to perform. Needless to say it has been both professionally and personally rewarding. Since the completion of the last report the Commission has continued to independently and rigorously investigate the significant issues with which it has been entrusted. Its work is an important reflection of the commitment to the Rule of Law.

Kenneth Watkin

Professor Timothy LH McCormack

It has been an honour for me to serve as one of two International Observers for Phase II of the Public Commission appointed to inquire into the maritime incident of 31 May 2010. I was formally appointed to the Commission in June 2011 to join Lord David Trimble and to replace Brigadier Ken Watkin – a formidable undertaking because of the esteem in which I and all the other members of the Commission hold Ken.

There was no basis for any personal feelings of inadequacy. I was warmly welcomed by Justice Jacob Turkel, by the other members of the Commission, General Amos Horev, Ambassador Reuven Merhav and Professor Miguel Deutsch, by Lord Trimble, by the Commisson Co–ordinator, Hoshea Gottlieb, and by the research and administrative staff of the Commission. From my first visit to the Commission in June 2011 and through all subsequent visits I have consistently been received as an integral participant in the Commission's work. I am grateful for the warmth of that reception. My only regret is that I did not have the privilege of working with Ambassador Shabtai Rosenne who died before I joined the Commission.

I considered the focus of Phase II of the Commission's Inquiry – Israel's Mechanisms for Examination and Investigation of Alleged Violations of the Law of Armed Conflict – both intriguing and laudable. I was impressed that the Government of Israel was prepared to undertake this broad–ranging inquiry into its structures and procedures for investigating alleged violations of the Law of Armed Conflict and that they would do so by involving international observers throughout every stage of the inquiry process and ensuing deliberations. Other States would do well to follow Israel's example by including international observers in commissions of inquiry and, in my view, Israel itself would benefit from consistently following its own lead in the proceedings of all its other commissions of inquiry.

When I was first invited to replace Brigadier Watkin, I was acting as Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague – a position I still hold. I discussed my Turkel Commission invitation with the then Prosecutor, Luis Moreno Ocampo, and we agreed that any State, Party or non–State Party to the Rome Statute, which wanted to review its national processes for investigation of alleged violations of the Law of Armed Conflict should be encouraged to do so. I remain grateful for Mr Ocampo's endorsement of my involvement in Jerusalem.

The subject matter of the Commission's work is of fundamental importance, not only for Israel but also for other States desirous of complying with international legal obligations and for the International Criminal Court itself given the complementarity formula in Article 17 of the Rome Statute. The essential requirements for an effective investigation of an alleged violation of the Law of Armed Conflict have received too little detailed analysis in the past. It has been a thoroughly rewarding professional experience for me to be involved in the comprehensive study now reflected in the Commission's Report. I am particularly grateful for the productive collaboration I have enjoyed with the indefatigable Commission Co–ordinator, Hoshea Gottlieb, and also with my dear friend and former PhD student from the Melbourne Law School, Dr Michelle Lesh. I believe that the Commission's study has identified the applicable international legal requirements for effective investigations into alleged violations of the Law of Armed Conflict and the ways Israel can improve its procedural and structural mechanisms consistently with such requirements. Of course world's best procedures and structures are of limited utility in the absence of effective implementation. My hope is that the tabling of the Commission's Report will provide an impetus for improvement in both theory and practice.

At the time of my appointment to the Commission, my own nation of Australia was engaged in an ongoing process of reform of our military justice system. I was particularly interested in the comparative study of selected national military justice systems by the Commission and was extended the privilege of preparing the Australian national report for this study. A former student from the Melbourne Law School, Megan Donaldson, now in the JSD program at New York University Law School, spent a few months in Jerusalem and did a superb job in assisting me with the Australian Report. I remain deeply indebted to her.

Although it was somewhat disadvantageous for me to join the Commission in June 2011 after hearings with interested parties had been completed, I attempted to familiarize myself with the testimony presented to the Commission. I was never precluded from accessing any of the relevant materials which were translated into English. Instead, I was encouraged to become fully engaged in the Commission's work. It is my observation that the members of the Commission and the international observers were free to deliberate and to recommend as we saw fit without interference from, and independently of, the Government of Israel.

Professor Tim McCormack

Preface to the Second Report

The Commission's Second Report concerns one of the most important questions in international law generally, and in countries that respect the principles of the rule of law particularly, namely the procedures for examining and investigating complaints and claims of violations of international humanitarian law.[1] The manner in which such procedures are applied in Israel has legal, moral and educational aspects with significant ramifications both internally, for the Israeli society's views of itself, and externally, for the international community's views of Israel.

Unlike the Commission's First Report, where the examination was carried out retrospectively, this Report is prospective and its purpose is to identify principles and methods to improve the mechanisms functioning in Israel, to ensure that they conform to the rules of international law and to the currently prevailing trends in other countries. The Commission also relied on lessons that were learned from the investigation of the maritime incident of 31 May 2010. These lessons revealed, for example, the great importance of written and detailed procedures and documentation reflecting the examination and investigation process in a reliable, fair, clear and precise manner. Standard operating procedures and documentation requirements are important through every stage – from the initial report of an incident until the examination and investigation are completed.

This Report, in its five chapters, is the result of considerable efforts to derive the main principles of international law from sources that are often vague and unclear, and from a comparison of legal systems and practices in other countries. Similar efforts were also devoted to examining the various mechanisms in Israel and their operating methods, which are

1 The term 'laws of armed conflict' is used in the wording of Resolution No. 1796 of the 32nd Government, *Appointment of an Independent Public Commission, Chaired by Supreme Court Justice (ret.) Jacob Turkel, to Examine the Maritime Incident of 31 May 2010* (Jun. 6, 2010), para. 5 [hereinafter: *the Government resolution to appoint the Commission*]. However, in this Report we use 'international humanitarian law', according to the meaning of this term in Chapter A of this Report.

not always set out and defined precisely in written rules. On this basis, it was possible to provide a picture of the current Israeli situation and to recommend improvements to it.

The compilation of the Second Report turned out to be a much more difficult, complex and intricate process then expected at the outset. The considerable work invested in it resulted in a large–scale document that comprises approximately 470 pages and 500 pages of appendices. The introduction below is an attempt to outline a kind of 'road map' that is intended to enable the reader to find her or his way in what appears to be a maze of questions, sources, surveys, conclusions and recommendations.

INTRODUCTION

THE BACKGROUND TO THE FORMATION OF THE COMMISSION AND THE GOVERNMENT RESOLUTIONS

1. Let us consider some of the background contained in the introduction to the First Report. After the maritime incident of 31 May 2010, which was the focus of the Commission's First Report, and in view of the regrettable outcomes of the incident, the Government of Israel resolved on 14 June 2010 to establish an independent public commission to examine the maritime incident of 31 May 2010 (hereinafter: the Government's resolution to appoint the Commission).[2] The Commission was also requested, in paragraph 5 of the Government's resolution, to assess 'whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict, as conducted in Israel generally, and as implemented with regard to the present incident, [the maritime incident of 31 May 2010], conforms with the obligations of the State of Israel under the rules of international law'.[3] This particular mandate required the Commission to determine whether Israel is complying with its obligations to examine and investigate such complaints and claims, *inter alia*, in view of the criticisms leveled in Israel and internationally with regard to the manner in which Israel investigates complaints and claims of violations of international humanitarian law. It should be noted that on 4 July 2010, the Commission's powers were extended and it was granted certain powers pursuant to the Commissions of Inquiry Law, 5729–1968.[4]

2. On 3 April 2009, the President of the United Nations Human Rights Council (hereinafter: the Human Rights Council) appointed a

2 *The Government resolution to appoint the Commission, supra* note 1.

3 *Id.*, at para. 5.

4 See: the Justice Minister's resolution: *Determination regarding the Granting of Powers to the Public Commission for Examining the Maritime Incident of 31 May 2010* (Jul. 5, 2010).

committee 'to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza' ('Operation Cast Lead'), and Judge Richard Goldstone was chosen to chair the committee (hereinafter: the Goldstone Committee).[5] Israel did not cooperate with the Goldstone Committee. On 29 September 2009, the Goldstone Committee submitted its conclusions to the Human Rights Council (hereinafter: the Goldstone Report).[6] Part four of the Goldstone Report included harsh criticism of the functioning of the Israeli examination and investigation mechanisms in response to claims of breaches of international humanitarian law.[7]

3. On 14 April 2010, the Human Rights Council adopted decision no. 13/9, according to which a committee of independent experts, chaired by Prof. Christian Tomuschat, would be set up to consider the manner in which Israel and the Palestinians investigate claims that were raised with regard to the actions of the combatant parties in Operation Cast Lead, which were included in the Goldstone Report (hereinafter: the Tomuschat Committee).[8] Israel did not cooperate with the Tomuschat Committee. On 21 September 2010, the Tomuschat Committee submitted its conclusions to the Human Rights Council.[9] This report, *inter alia*, criticized the Israeli examination and investigation systems. In particular, it stated that the operating method of the military mechanisms that are responsible for

5 See: The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, U.N. Doc. A/HRC/S–9/L.1, para. 14 (Jan. 12, 2009).

6 See: Press Release (Apr. 3, 2009), *available at:* http://unispal.un.org/UNISPAL.NSF/0/9E392B6EBDA7173D8525758D0049B222; See also: Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact–Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (2009).

7 *Id.*, at paras. 1773–1835.

8 See: Follow–up to the report of the United Nations Independent International Fact–Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/RES/13/9 (Apr. 14, 2010).

9 See: Human Rights Council, Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 254/64 including the independence, effectiveness, genuineness of these investigations and their conformity with international standards, U.N. Doc. A/HRC/15/50 (Sep. 23, 2010).

investigating violations of international humanitarian law in Israel 'raises concern'.[10]

4. In decision no. 15/6 of 6 October 2010, the Human Rights Council asked the Tomuschat Committee to continue the inspection and assessment of the Israeli and Palestinian investigations systems.[11] As a result of the resignation of two of the Committee's members, Justice Mary McGowan–Davis, one of the members of the original Tomuschat Committee, was appointed to serve as chair of the Committee (hereinafter: the Davis Committee).

5. On 18 March 2011, the Davis Committee submitted its conclusions.[12] In its conclusions, the Davis Committee noted that Israel had made progress in investigating concrete cases mentioned in the Goldstone Report, and that considerable resources had been invested therein. The Davis Committee reiterated that in certain areas there was a concern that Israel was not complying with its obligations under international law. However, the Davis Committee spoke favorably of the Turkel Commission's work method and its conclusion was that a public commission of inquiry such as the Turkel Commission was an example of a mechanism that Israel could use.[13]

10 *Id.*, at para. 91; see also: *Id.*, at para. 43 and the conclusions of the report regarding Israel in paras. 89–95.

11 See: Follow–up to the report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution, UN Doc A/HRC/RES/15/6 (Oct. 6, 2010).

12 See: Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, UN Doc A/HRC/16/24 (Mar. 18, 2011).

13 *Id.*, at para. 80.

Members of the Turkel Commission, Advisers to the Commission and the Professional Staff

6. As stated in the Turkel Commission's First Report, retired Supreme Court Justice Jacob Turkel was appointed to chair the Commission, and the late Prof. Shabtai Rosenne and General (ret.) Amos Horev were appointed as members. In addition, two foreign experts were appointed to act as observers: Lord David Trimble of Ireland, a Nobel Peace Prize winner and formerly First Minister of Northern Ireland, and Brigadier–General (ret.) Kenneth Watkin, former Judge Advocate General of the Canadian Forces.[14]

Advocate Hoshea Gottlieb was appointed as the Commission's Coordinator.

7. In July 2010, the composition of the Commission was expanded to include two additional members, Ambassador Reuven Merhav and Prof. Miguel Deutch.[15] On 21 September 2010, Prof. Shabtai Rosenne passed away, but it was decided not to appoint another member, and the chair of the Commission was given 'an additional vote in any case where the votes of the members of the Commission were tied'.[16]

8. On 14 April 2011, upon his appointment as Stockton Professor of International Law at the United States Naval War College, Brigadier–General (ret.) Kenneth Watkin resigned as a foreign observer on the

14 The curriculum vitaes of these Commission members and of the foreign observers were briefly detailed in the preface to *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission* Report Part One, (2011) [hereinafter: The Commission's First Report]. For more comprehensive curriculums; see the Commission's website: www.turkel–committee.gov.il.

15 Resolution No. 2134 of the 32nd Government, *Appointment of additional members to serve on the Public Commission chaired by retired Supreme Court Justice Jacob Turkel to Examine the Maritime Incident of 31 May 2010* (Jul. 25, 2010). The curriculums of these Commission members were briefly detailed in the preface to The Commission's First Report. For more comprehensive curriculum vitaes; see the Commission's website, supra.

16 Resolution No. 2297 of the 32nd Government, *The Public Commission chaired by retired Supreme Court Justice Jacob Turkel to Examine the Maritime Incident of 31 May 2010 – following the death of the late Prof. Shabtai Rosenne* (Oct. 4, 2010).

Commission. Brigadier–General Watkin contributed substantially to both of the Commission's Reports, and for this the Commission is most appreciative.

9. On 23 June 2011, the Government of Israel appointed Professor of International Humanitarian Law Timothy McCormack, Professor of Law at the Melbourne Law School, and the Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague, as a foreign observer to replace Brigadier–General (ret.) Watkin.[17] Here it should be emphasized, that although the Government's resolution to appoint the Commission stipulated that the observers 'would not have a right to vote with regard to the proceedings and conclusions of the Commission', according to the decision of the chair of the Commission, the observers acted as actual members, participated actively in all the sessions and deliberations of the Commission, and made a significant contribution in the expertise they provided to both of the Commission's reports.[18] It should be noted that no open or closed session of the Commission took place without the participation of the observers. The Commission is most grateful to them.

10. Several reputable expert advisers in the field of international law contributed to the Commission's two reports. In the Second Report, Prof. Michael Schmitt,[19] assisted the Commission until September 2011 when he was appointed as chair of the International Law Department at the United States Naval War College. Prof. Claus Kreß, the director of the Institute for International Peace and Security Law at the University of

17 Resolution No. 3338 of the 32nd Government, *The Public Commission chaired by retired Supreme Court Justice Jacob Turkel to Examine the Maritime Incident of 31 May 2010 – Appointment of a foreign observer* (Jun. 23, 2011).

18 *The Government resolution to appoint the Commission, supra* note 1, at para. 3.

19 *Prof. Michael Schmitt*. During the period that he advised the Commission, he served as the Chair of Public International Law at Durham University in the United Kingdom and as the General Editor of the Yearbook of the International Humanitarian Law.

Cologne,[20] and Prof. Gabriella Blum of Harvard University,[21] also assisted the Commission and both agreed with the legal analysis in this Report (as set out in Chapter A) and advised the Commission in formulating its recommendations.

11. The professional staff that assisted the Commission's work during various periods included many lawyers, jurists and students from Israel and abroad, most of whom have advanced degrees specializing in international law. In particular, we would like to mention the important contribution of Dr. Michelle Lesh,[22] Dr. Carmit Karin Yefet[23] and Advocate Moran Yahav.[24] In addition, administrative assistance was received especially from Mrs. Mali Peretz and Mr. Avi Attias. The Commission thanks them all.

12. The Commission's Coordinator, Advocate Hoshea Gottlieb,[25] expertly and efficiently managed and coordinated the professional contacts with the advisers, experts and professional and administrative staff. His professional skills and administrative abilities, together with a profound understanding of the international legal arena, enabled the Commission to compile a comprehensive and thorough report.

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20 *Prof. Claus Kreß*. Professor of Public International Law and Criminal Law, Director of the Institute of International Peace and Security Law, and Chair of German and International Criminal Law, University of Cologne, Faculty of Law, Germany. Prof. Kreß has also been serving as a member on Germany's delegation in the negotiations on the International Criminal Court since 1998.

21 *Prof. Gabriella Bloom*. Rita E. Hauser Professor of Human Rights and Humanitarian Law at Harvard Law School, U.S.A.

22 Ph.D, Melbourne Law School, Australia.

23 J.S.D., Yale Law School, U.S.A.

24 LL.M, New York University Law School, U.S.A. (J.S.D. candidate).

25 LL.M, Harvard Law School, U.S.A.

THE COMMISSION'S SECOND REPORT

13. As stated above, in the Second Report, the Commission has considered the question presented in paragraph 5 of the Government's resolution to appoint the Commission, namely 'whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict, as conducted in Israel generally, and as implemented with regard to the present incident, [the maritime incident of 31 May 2010], conforms with the obligations of the State of Israel under the rules of international law'.[26] It should be noted here that whereas this Report distinguishes between the duty to examine and the duty to investigate, no distinction is made between the terms 'complaints' and 'claims', and they are used interchangeably.

14. The Commission focused mainly on the rules of international humanitarian law. The Commission also relied on the rules of international human rights law, international criminal law and the laws of State responsibility in so far as they were relevant to the issue under consideration (examination and investigation mechanisms for complaints and claims raised concerning violations of international humanitarian law). The Commission also took into consideration the relevant rules of Israeli constitutional and administrative law and general principles of the rule of law.

15. In this Report, the Commission mainly assessed the military examination and investigation mechanisms. As can be seen from the material that was submitted to the Commission, most of the claims of violations of the laws of armed conflict are directed at the Israel Defense Forces (hereinafter: the IDF), as the central security branch involved in combat. However, the Commission also saw fit to assess the examination and investigation mechanisms of other security branches, such as the

26 *The Government resolution to appoint the Commission, supra* note 1.

Israel Police, the Israel Security Agency (hereinafter: the ISA) and the Israel Prison Service, both with respect to the investigation of incidents occurring in the West Bank and with respect to the investigation of incidents occurring in Israel. It should be emphasized that claims of breaches of the rules of international humanitarian law may also be leveled at senior decision–makers, whether in the military establishment or in the civilian leadership.

The Commission also assessed the oversight and review mechanisms of examination and investigation mechanisms, whether in appeal proceedings or in administrative review proceedings.

16. Here we should reiterate that the focus of this Report is prospective. In other words, the Commission has considered only fundamental jurisprudential questions of why, what, when and how complaints and claims of violations of international humanitarian law should be examined and investigated; the Commission has not assessed the application of these questions to specific cases.

17. It should be further noted that in the preface to the First Report, the Commission stated that in this Second Report it would consider additional questions that arose during its work, 'including questions that are of internal Israeli importance'.[27] Meanwhile the State Comptroller published a comprehensive report on 12 June 2012, in which he addressed the implementation of the National Security Council Law and the Councils' involvement in decision–making processes on foreign affairs and security issues. The State Comptroller's Report also addressed the decision–making processes in the Government with regard to the interdiction of the Turkish flotilla and the interaction in this regard between the political echelon and the IDF, including the planning, operation and control of the intelligence bodies involved in the maritime incident. Moreover, the

27 See: THE COMMISSION'S FIRST REPORT, at para. 12.

State Comptroller's report considered the performance of the national public relations mechanisms and additional public relations organizations with respect to the maritime incident.[28] In view of the comprehensive and detailed consideration of these and other issues in the State Comptroller's Report (and without addressing the content of that Report), and as these issues were dealt with in other forums, the Commission is of the opinion that there is no need for it to consider these questions further at this time.

THE COMMISSION'S METHODOLOGY

18. The Commission assembled the information that it needed in various ways, including by means of oral and written testimony. The Commission heard witnesses that clarified the subjects of its deliberations from various viewpoints: the Attorney–General, the Deputy State Attorney (Special Assignments), the Military Advocate–General (hereinafter: the MAG), the Chief Military Police Commissioner, the head of the ISA, the ISA's legal adviser and the authorities involved in examining the claims of persons interrogated by the ISA, as well as representatives of human rights organizations, including B'Tselem, the Association of Civil Rights in Israel, Yesh Din and the Public Committee Against Torture. Moreover, researchers in the field of international law – Prof. Eyal Benvenisti, Prof. Yuval Shany and Dr. Amichai Cohen – testified. The Commission sought to obtain first–hand accounts by hearing testimony from complainants who were mentioned in the reports submitted to it by the human rights organizations, but ultimately only two family members of Mr. Yassir A–Tameizi, who was killed during IDF operations in the area of Hebron, came forward to testify.

In view of the importance of bringing as much information as possible before the public, the testimonies were heard in open sessions. Some of the

28 See: State Comptroller, *Inspection Report on Implementation of the National Security Council Law and the Handling of the Turkish Flotilla* (2012).

testimonies were heard *in camera*, in order to protect State security and its foreign relations, pursuant to the Government's resolution to appoint the Commission.[29] However, the witnesses were told that after hearing the testimonies *in camera*, the Commission might see fit to disclose parts of them. All of the transcripts of the testimonies that were heard in open sessions have been made available on the Commission's website.[30] All of the testimonies were translated simultaneously into English, and the English transcripts were also made available on the Commission's website.

Apart from hearing testimony from witnesses, a considerable amount of material was also obtained at meetings between the Commission's Coordinator and various parties, including the MAG, the director of the Police Internal Investigations Department, the Deputy State Attorney (Criminal Matters) and senior police officers. Moreover, the Commission's Coordinator met with Colonel Erez Katz, who was in charge of one of the five Special Experts Debrief teams that were set up after Operation Cast Lead, in order to study the operational debriefing process in the IDF. The Commission also received from various parties many documents and surveys on matters relating to the subject of its work. The Commission also studied various domestic and international reports in order to clarify the questions before it. The documents that were submitted to the Commission, apart from classified documents, are available to the public at the Commission's website.[31]

In total, the Commission heard 16 testimonies over five days of hearings, of which four testimonies were heard *in camera*, and four meetings were held to obtain additional material. A list of the witnesses that appeared before the Commission and the dates of the testimonies are set out as Annex A of this Report.

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29 *The Government resolution to appoint the Commission, supra* note 1, at para. 7.

30 See: www.turkel–committee.gov.il.

31 *Id.*

The Commission thanks all those who contributed from their time and expertise to its work, for enriching the factual, legal and institutional assessment of the complex questions the Commission dealt with.

19. In addition to examining all these documents, the Commission undertook a comprehensive comparison of the examination and investigation mechanisms of six Western countries (hereinafter: the comparative survey). The Commission also examined sample cases in which examinations and investigations were carried out by the IDF's examination and investigation mechanisms (hereinafter: the sample examination).

The Comparative Survey

20. The aim of the comparative survey was to examine the mechanisms used in Israel in comparison to the mechanisms of other countries. Admittedly, each country has its own considerations when it chooses the appropriate tools and mechanisms for the purpose of fulfilling its obligations under international law. Such considerations relate to the circumstances of that country and its inhabitants, its government institutions, and its constitutional and legal system. Despite the differences in national approaches, the survey provides a wide range of mechanisms that countries may adopt in order to examine and investigate violations of intrnational humanitarian law. It also assists in critically assessing the pros and cons of the different systems when considering the legal and operational needs and realities in Israel.

21. The six countries that were examined – the United States, Canada, Australia, the United Kingdom, Germany and the Netherlands – were chosen for several reasons: they are widely accepted as committed to the rule of law; they have been engaged in recent years in extensive

and diverse military operations which included complex armed conflict situations involving non–State groups, hostilities conducted in close proximity to a civilian population and situations in which the classification of the conflict (international or non–international armed conflict) was less than definitive; and they have sophisticated systems of investigation for violations of international humanitarian law. Four of these countries have a common law system, which is generally the system practiced in Israel, whereas two of them (Germany and the Netherlands) have a Continental law system.

22. For the purpose of carrying out the surveys, reputable experts in the relevant fields were chosen from each of the six countries. Some of them have practical experience, including serving in senior positions in the military justice systems of the countries that were surveyed. The US report was compiled by Prof. Sean Watts of Creighton University in the United States, who served as a Judge Advocate General in the United States army; the Canadian report was compiled by Captain (Navy) (ret.) Holly McDougal, who served as the Director of Military Prosecutions for the Canadian Forces; the Australian report was compiled by Prof. Timothy McCormack of the University of Melbourne in Australia, who is an observer of this Commission; the UK report was compiled by Prof. Peter Rowe of the University of Lancaster in the United Kingdom;[32] the German report was compiled by Prof. Wolff Heintschel von Heinegg, Vice–President of the Europa–Universität Viadrina in Frankfurt (Oder) and by his assistant Dr. Robert Frau; the Netherlands report was compiled by Prof. Terry Gill of the University of Amsterdam and the Netherlands Defence Academy and by Major (res.) J.J.M. van Hoek of the Public Prosecutions Department in the office of the General Prosecutor in Arnhem.

The experts were sent an identical questionnaire (see Annex C of this Report), which mainly concerns a survey of the law in force in those

32 Prof. Peter Rowe also provided the Commission with comments on a preliminary draft of Chapter A.

countries and a description of the ways of examining and investigating complaints and claims of violations of international humanitarian law that are committed by the armed forces of the aforesaid countries. Information was also requested about the institutions that examine and investigate violations of international humanitarian law that are committed by other security forces and by civil authorities, as well as the examination and investigation processes. After the Commission received the country reports, it requested additional information from the experts on several matters. Chapter B of this Report is a summary of these reports (the full country reports are attached as Annex C of this Report).

The Commission thanks Ms. Megan Donaldson[33] for her important contribution to the preparation of the comparative survey.

The Sample Examination

23. As stated above, the Commission was not satisfied with the testimonies and materials submitted to it, so it also examined in detail a sample of cases in order to form a more comprehansive understanding of the examination and investigation processes. For this purpose, the Commission's Coordinator wrote to the MAG a request to submit to the Commission a sample of approximately 60 cases: 28 of these were mentioned in international and domestic reports and in documents submitted to the Commission by human rights organizations, and 30 of these were determined in accordance with categories defined by the Commission, such as incidents where it was decided not to open a Military Police investigation, incidents that were investigated by the Military Police where it was decided not to file an indictment and cases in which an indictment was filed (the letter of the Commission's Coordinator to the MAG is attached as Annex B of this Report). Of this sample, ten cases were chosen and were examined

33 LL.M, New York University Law School, U.S.A. (J.S.D. candidate).

thoroughly. The examination was carried out by Advocate Einat Benita, Senior Deputy District Attorney in the Central District, who examined, in accordance with the guidelines of the Commission's Coordinator, how the cases were handled, the contribution of the operational debriefing to the decision whether to open an investigation, and the quality of the investigation as it appears from the file. The Commission thanks her for her meticulous work.

It need not be said that a sample examination of this kind cannot provide a comprehensive picture, but the sample did allow the Commission to form an impression of the ways in which examinations and investigations are actually carried out. It should also be pointed out that a similar sample examination was carried out in 2007 by the State Attorney's Office for the purpose of examining complaints and claims raised against ISA interrogators. Also the results of that examination were used by the Commission.

The Structure of the Report

24. This Report contains five chapters. Chapter A outlines the normative framework that governs the examination and investigation of complaints and claims regarding violations of international humanitarian law. This chapter, like the other chapters of the Report, was structured in accordance with the four questions that it seeks to answer: what are the normative sources of the duty to examine and investigate alleged violations of international humanitarian law as they are reflected in the relevant bodies of international law ('why investigate?'); what are the types of breaches that should be examined and investigated ('what to investigate?'); what are the grounds that give rise to the duty to examine and investigate and the way in which those grounds vary depending on the facts of the concrete event and the particular context in which it occurred ('when to investigate?');

and what are the general principles for conducting an examination and an investigation under international law ('how to investigate?').

25. Chapter B is a summary of the reports that were submitted to the Commission within the context of the comparative survey. As stated above, this chapter aims to describe and explain the manner in which the rules of international law are applied in six countries: the United States, Canada, Australia, the United Kingdom, Germany and the Netherlands. We should point out that this chapter uses the same terms used in the country reports submitted to the Commission, and not the terms that the Commission used in other chapters. This was done for the sake of precision and to preserve the wording of the actual reports.

26. Chapter C surveys the examination and investigation mechanisms in Israel. First, it presents the normative framework that gives rise to the duty to investigate violations as it is defined in Israel; whether according to Israel's international law obligations or according to Israeli domestic law ('why investigate?'). The second section of the chapter sets out the normative provisions applicable in Israel, that define the violations that give rise to a duty to investigate under Israeli law, i.e., what are the offenses involving violations of international humanitarian law that are recognized by Israeli domestic law ('what to investigate?'). The third section of the chapter describes the Israeli examination and investigation mechanisms for complaints and claims regarding violations of international humanitarian law, which are raised against members of the IDF, police, ISA workers, prison wardens and the civilian echelon, and the institutions that oversee and review their conduct ('who investigates?'). The fourth section of the chapter presents the grounds for the initiation of an examination and investigation by the various mechanisms, including the reporting procedures ('when to investigate?'). The last section of the chapter surveys the procedures for carrying out the examination and investigation as practiced by the various mechanisms ('how to investigate?').

27. Chapter D considers whether the mechanisms in Israel that examine and investigate complaints and claims of violations of the rules of international humanitarian law (Chapter C) are consistent with the obligations of the State of Israel under the rules of international law (Chapter A), in comparison to the trends that can be seen from the practices of the countries that were surveyed (Chapter B). *Inter alia*, we examined whether the offenses defined in Israeli domestic law are consistent with the offenses defined in international humanitarian law that give rise to an obligation to investigate. Likewise, we examined whether the grounds that give rise to the duty to investigate in Israeli law are consistent with those in international law, and we considered the examination and investigation institutions in Israel, as well as the criteria on which they operate, when they carry out examinations and investigations, and whether all of these are consistent with the rules of international law.

This chapter also incorporates, according to subject categories, the conclusions reached by the Commission and the recommendations that it made on matters where it saw fit to do so.

28. Chapter E concerns a special matter: the manner in which the maritime incident of 31 May 2010, was examined and investigated. This serves as a kind of test case (albeit not a typical one) of the manner in which complaints and claims of violations of international humanitarian law in Israel are examined and investigated. The first section of this chapter contains, in brief and merely as a reminder, a short review of the sequence of events that were described in detail in the Commission's First Report. The second section of the chapter reviews the examination and investigation operations that were carried out by the various mechanisms in Israel. The third section of the chapter considers some of the issues arising from the circumstances of the incident that relate to the examination and investigation mechanisms and the manner in which they operated in the

investigation of the aforesaid incident, from the viewpoint of the rules of international law, as set out and analyzed in this Report.

The Commission's Main Conclusions and Recommendations

29. As stated in the Preface of this Report, the examination and investigation methods that are the subject of this Report have legal, moral, and educational aspects with significant implications for the image of the State of Israel, both domestically and internationally. At the end of the Commission's deliberations and examinations, it may be determined that the examination and investigation mechanisms in Israel for complaints and claims of violations of international humanitarian law and the methods they practice, generally comply with the obligations of the State of Israel under the rules of international law. However, the Commission is of the opinion that in several of the areas examined there are grounds for amending the examination and investigation mechanisms and that in several areas there are grounds for changing the accepted policy. The Commission is also of the opinion that certain accepted practices – that are appropriate in themselves – should be enshrined in express written guidelines that are made publicly available. It should be emphasized that where the Commission saw a need for amendments or changes to the mechanisms and operating methods, it does not necessarily indicate essential flaws, but rather it is a blueprint for optimal improvement.

30. Thus, for example, the Commission has recommended domestic Israeli legislation to enshrine international norms that Israel already recognizes and implements. This will constitute a declaration of the commitment of the State of Israel to these norms that already guide the Israeli defense establishment. Another of the Commission's important recommendations is to change the current practice in the IDF whereby

the decision to initiate an investigation is based on the operational debrief. Additional recommendations that should be given special attention relate to the timeframe set for the MAG to make his decision about whether to initiate an investigation. Moreover, in the Commission's view there is a need to change the methods of appointing the MAG and the Chief Military Prosecutor and to determine in advance their term of office. The Commission also recommends strengthening the oversight and review powers of the civilian legal system over the military justice system. With regard to investigations that are conducted by the Israel Police, the Commission recommends transferring the investigation of shooting incidents in the West Bank from the police to the IDF. With regard to the examination of complaints and claims of persons interrogated by the ISA against their interrogators, the Commission also thinks that there is a need for a structural change to the mechanisms for examining the complaints.

31. In total the Commission has made 18 recommendations which conclude this Report (in addition to the recommendations contained in chapter E). When each of these recommendations has been implemented, Israel should be confident that its examination and investigation mechanisms will reflect international best practice.

CHAPTER A: THE NORMATIVE FRAMEWORK IN INTERNATIONAL LAW FOR THE DUTY TO EXAMINE AND INVESTIGATE COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

INTRODUCTION

1. This chapter presents the normative framework for the duty under international law to examine and investigate complaints and claims of violations of international humanitarian law. In the first section of the chapter we will briefly outline the bodies of international law that govern this duty: primarily international humanitarian law, and also international human rights law, international criminal law and the law of State responsibility. In the second section of this chapter we will review the sources of the duty to examine and investigate alleged violations of international humanitarian law as they are reflected in the relevant bodies of law ('why investigate?'). In the third section of the chapter we will explain the meaning of violations of international humanitarian law in general, and will define the violations that constitute 'war crimes' ('what to investigate?'). In the fourth section of the chapter we will present the grounds that give rise to the duty to examine and investigate and the way in which those grounds vary depending on the facts of the concrete event and the particular context in which it occurred ('when to investigate?'). In the fifth section of the chapter we will outline the general principles for conducting an examination and an investigation under international law ('how to investigate?').

A. Background

2. The international law governing the use of force broadly consists of the *jus ad bellum* and the *jus in bello*. The former governs *when* States may resort to force and it addresses issues such as the prohibition on the use of force found in customary law and set forth in Article 2(4) of the United Nations Charter; the right of States to engage in self–defense in accordance with customary law and Article 51 of the Charter; and mechanisms for ensuring collective security, which are set forth in Chapter VII of the UN Charter.[1]

By contrast, the *jus in bello* incorporates the international legal regime governing *how* force may be employed during an armed conflict. This latter body of law is commonly referred to as either the 'law of armed conflict' or 'international humanitarian law'.[2] International humanitarian law, which applies only during an 'armed conflict' as defined in the law, sets forth obligations, rights and protections for States and individuals who are involved in, or are otherwise affected by, an armed conflict.[3] Issues such as the conduct of attacks, the legitimate means of warfare, detention, and the administration of an occupation are all dealt with in the framework of this body of law.

It should be emphasized that one of the most important and well–established principles in international law is the independence of the *jus in bello* from the *jus ad bellum*. In other words, international humanitarian

1 See: Articles 2(4), 39–42, 51 of the Charter of the United Nations, 3 Bevans 1153 (1945).

2 The Commission will adopt the term 'international humanitarian law' in this Report.

3 International humanitarian law places obligations on States even when they are not a Party to the armed conflict. See for example: Common Article 1 of the Geneva Conventions: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S 31, Common Article 1 (1949); Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S 85, Common Article 1 (1949); Convention (III) relative to the Treatment of Prisoners of War (IV), 75 U.N.T.S 135, Common Article 1 (1949); Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S 287, Common Article 1 (1949) (Israel signed the conventions on Dec. 8, 1949 and ratified them on Jul. 6, 1951) [hereinafter: Geneva Conventions].

law applies equally and uniformly in every situation amounting to an 'armed conflict' as defined in the law, irrespective of the question of the legality or legitimacy of the resort to force by the Parties to the conflict or whether a Party is either an 'aggressor' or a 'victim' in *jus ad bellum* terms.[4]

3. Alongside international humanitarian law, there are three additional bodies of law relevant to the duty to examine and investigate violations of international humanitarian law: international human rights law, international criminal law, and the laws of State responsibility. Each of these bodies of law is comprised of treaty law,[5] customary law[6] and 'soft

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4 See: Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, 28 (Dieter Fleck ed., 2nd ed. 2008) [hereinafter: FLECK (ed.), THE HANDBOOK]. The rationale behind this principle is that the determination of who is the aggressor and who is the victim is often controversial and difficult to decide. However, it should be noted that framing the principle in this manner also ensures that the aggressor will have an incentive to uphold international humanitarian law. See: Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90(872) IRRC 931, 939 (2008).

5 The accepted definition of a treaty is enshrined in Article 2(1)(a) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Article 2(1)(a) (1969): an 'international agreement that was made in writing between states and is subject to international law, whether it is embodied in a single document or in two or more documents that are related to one another, and irrespective of whatever its special designation may be'. There is an important distinction between declaratory treaties (i.e., treaties that are based on international custom and codify it), and constitutive treaties (i.e., treaties that create new rules of international law) which may become declaratory over time due to the development of custom. (See Robert Jennings, *What is International Law and How Do We Tell It When We See It?*, 37 SW. Y.B. INT'L L. 59, 62 (1981)). Treaties that are classified as declarative will constitute a part of Israeli domestic law and will not require an act of transformation into Israeli law. See: HCJ 41/49 *Shimshon Ltd. v. Attorney–General, 4(4) 143, 145–146* (1951). By contrast, a constitutive treaty needs to be adopted into legislation, as stated by former Supreme Court President Shamgar: 'The rules of conventional international law are not adopted automatically and do not become a part of the law in Israel as long as they have not been adopted or incorporated by means of legislation and become a part of the law in Israel by virtue of the provisions of statute or secondary legislation, which derives its authority from a legislative arrangement' (HCJ 69/81 *Abu Aita v. The Regional Commander of Judea and Samaria*, 37(2) 197, 234 (1983)). For further reading on the application of treaty and customary law in Israel see: Ruth Lapidoth, *International Law Within the Israeli Legal System*, 24 ILR 451 (1990). For additional reading on treaty law in international law, see: IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12–16 (7th ed., 2008) [hereinafter: BROWNLIE, PRINCIPLES]; MALCOLM SHAW, INTERNATIONAL LAW 93–98 (6th ed., 2008) [hereinafter: SHAW, INTERNATIONAL LAW]. See also bellow, Chapter C of this Report, para. 2.

6 See: Article 38(1)(b) of the Statute of the International Court of Justice, 1 U.N.T.S. 993 (1945), which incorporates two elements that are required for the formulation of a customary rule in international law: a consistent practice by State representatives over a period of time, and a sense of legal obligation to act in accordance with the practice (*opinio juris*). The International Court of Justice (ICJ) went on to hold that these two elements should be regarded as 'axiomatic' elements for the purpose of proving the development of a customary norm in international law. See: Case Concerning the Continental Shelf (*Libyan Arab Jamahiriya v. Malta*), 1985 I.C.J. 13, para. 27 (June 3). For further reading, see: ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, xxxviii–li (Henckaerts & Doswald–Beck eds., 2005) [hereinafter: CIHL]; SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55, (1984). From the moment that a rule is recognized as reflecting customary international law, all States are bound by it. The sole exception to this is the 'Persistent Objector' rule. According to this rule, a State can exclude itself from the custom by persistently objecting to it during its formulation stages and before it becomes binding customary law. See the Fisheries Case (*United Kingdom v.*

law'.[7] We will now discuss these various bodies of law in turn.

1. International Humanitarian Law

4. The main sources of international humanitarian law[8] include the 1907 Hague Convention IV, and its annexed Regulations (hereinafter: the Hague Convention or the Hague Regulations) which are accepted as customary international law (and therefore binding on Israel);[9] the four 1949 Geneva Conventions: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter: the First Geneva Convention), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter: the Second Geneva Convention), the Geneva Convention relative to the Treatment of Prisoners of War

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Norway), 1951 I.C.J. 116, 131 (December 18); Brownlie, Principles, *supra* note 5, at 11. From the earliest days of the State of Israel, the Courts have held that 'customary international law is a part of Israeli law, subject to Israeli legislation that contains a contrary stipulation' (HCJ 785/87 *Al Affo v. Commander of I.D.F. Forces in the West Bank* 42(2) 4, 35 (1988)) [hereinafter: *Al Affo* case]. However, even in cases of a possible conflict between domestic law and international law, the Israeli Court is entitled to implement the 'presumption of interpretive conformity', i.e., 'to interpret the statute when it is ambiguous and its content does not require a different interpretation, in accordance with the provisions of international law' (CA 336/61 *Eichman v. Attorney–General* 16 2033, 2040 (1962)) [hereinafter: *CA Eichman*].

7 For a definition of 'soft law' see: The Inter–Agency Standing Committee Task Force on Humanitarian Action and Human Rights, *Frequently Asked Questions on International Humanitarian, Human Rights and Refugee Law*, 2 (Mar. 4, 2004), *available at:* www.unicef.org/emerg/files/FAQs_IHL.pdf: 'Soft International Law is an important body of non–treaty standards usually adopted within the framework of the United Nations system (declarations, bodies of principles, standard minimum rules, etc.). Although not legally binding, soft law serves to interpret and elaborate treaty provisions and to develop new standards in emerging areas of international law'.

8 The process of codifying these basic rules only began in the second half of the nineteenth century. Prior to that, the rules were customary in nature. See, for example: Instructions for the Government of Armies of the United States in the Field, commonly known as the 'Lieber Code', U.S. War Department, General Orders No. 100 (Apr. 24, 1863), *reprinted in* The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents, 3 (Dietrich Schindler & Jiri Toman eds., 1988).

9 The customary status of the Hague Regulations was first recognized in the Nuremberg trials at the end of the Second World War, see: Trial of the Major War Criminals before the International Military Tribunal vol. I, 253–254 (1947); The customary status was also recognized by the ICJ in its 1996 advisory opinion on the use of nuclear weapons, see: Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 1996 I.C.J. 226, para.78–79 (July 8) [hereinafter: *ICJ Nuclear Weapons Advisory Opinion*]. Therefore, even though Israel is not Party to the Hague Regulations it views itself as bound by them by virtue of their customary nature, see for example: HCJ 606/78 *Ayub v. The Minister of Defense*, 33(2) 113, 120 (1979); *The Public Commission for Examining the Maritime Incident of May 31, 2010* 3 (Military Advocate–General position paper, Jul. 29, 2010).

(hereinafter: the Third Geneva Convention), and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter: the Fourth Geneva Convention);[10] which are universally accepted to reflect customary law[11] (and have been signed and ratified by Israel);[12] and the two 1977 Additional Protocols to the Geneva Conventions. The First Additional Protocol concerns international armed conflicts (hereinafter: the First Additional Protocol),[13] whereas the Second Additional Protocol concerns armed conflicts that are not of an international character (hereinafter: the Second Additional Protocol).[14] Israel is not a Party to the Additional Protocols but recognizes their customary provisions.[15] Other treaties that

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10 See: GENEVA CONVENTIONS, *supra* note 3.

11 See: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 257; See also: Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.A.*), 1986 I.C.J. 14, para. 218 (June 27); FLECK (ed.), THE HANDBOOK, *supra* note 4, at 28.

12 The Geneva Conventions are recorded in Israel's *Convention Registry*: First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1949, TP 1, 387; Second Geneva for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, TP 1, 423; Third Geneva Convention relative to the Treatment of Prisoners of War, 1949, TP 1, 559; the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, TP 1, 453.

Since 1967, the official position of the State of Israel has been that the Geneva Conventions do not apply to the West Bank and the Gaza Strip because these were not territories of a 'High Contracting Party', as required by Common Article 2 of the Conventions. In 1971, the then Attorney–General, Meir Shamgar, declared that Israel would nonetheless comply with the 'humanitarian provisions' of the Fourth Geneva Convention (Meir Shamgar, *The Observance of International Law in the Administered Territories,* 1 ISR. Y.B.H.R. 262, 266 (1971)). However, the Government has never specified which provisions are 'humanitarian'. In recent years the Supreme Court has applied the Fourth Geneva Convention as a part of the main normative framework for considering cases before it; See: HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza*, 58(5) 385 (2004) [hereinafter: *2004 Physicians for Human Rights* case]; HCJ 201/09 *Physicians for Human Rights v. Prime Minister of Israel* (still unpublished, Jan. 19, 2009). It should be noted that in Israel, international conventions to which Israel is a Party to are not automatically part of domestic law. See: Chapter C, para. 2.

13 See: Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977) [hereinafter: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS].

14 See: Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non–International Armed Conflicts, 1125 U.N.T.S. 609 (1977) [hereinafter: SECOND ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS].

15 In his testimony before the Commission the Military Advocate–General, Major–General Avichai Mandelblit, stated: 'I think that your honor is well aware that neither we nor the Americans are fond of the First Additional Protocol. I would say the following. There are substantive provisions in the First Additional Protocol and there are procedural provisions that are intended to implement the substantive provisions. With regard to the substantive provisions, insofar as they indicate a customary norm such as the prohibition on indiscriminate attacks against civilians, for example, we accept that this is customary. We have great difficulty with the First Additional Protocol mainly because of its application clause that extends it to places that we do not think are correct, and which are certainly not customary, and in particular because they give greater power to what is referred to as 'liberation movements' at the expense of the military forces. Therefore our position is that everything that is not a substantive norm in the First Additional Protocol is not binding. In other words, we do not want to give it a customary status, and this is the traditional position of the State of

apply to wartime conduct include conventions on cultural property and arms control.[16]

5. The applicability of international humanitarian law is, as noted, dependent on the existence of an armed conflict. Treaty law recognizes

Israel'; see: Transcript – Part B, session no. 2 "Testimony of the Military Advocate–General" 53 (Apr. 11, 2011) [hereinafter: *MAG's Testimony*].

The Commission's position on the applicability of the First Additional Protocol is that since Israel is not a Party to the Protocol, it should only be subject to those provisions that reflect customary law. The International Committee of the Red Cross (ICRC) found in its 2005 study on customary international humanitarian law that the provisions of the First Additional Protocol relating to the duty to investigate and try perpetrators of violations of the conventions and protocols, do indeed reflect customary law (see: CIHL, *supra* note 6, at 607–611, and especially note 206). The Commission accepts this position, despite the fact that some aspects of the ICRC's study have been the subject of criticism (including by Israel), concerning the methodological approach of the study. See: *Military Advocate–General Position Paper* 22 (Dec. 19, 2010) [hereinafter: *MAG Position Paper 2010*].

16 See for example: Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S 240 (1954) (Israel signed the treaty on Apr. 16, 1958 and ratified it on Jul. 1, 1958) [hereinafter: *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*]; The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1014 U.N.T.S 163 (Israel is not a Party to this convention) [hereinafter: *The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*]; Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (Dec. 10, 1976), 1108 U.N.T.S. 151 (Israel is not a Party to this convention); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 1342 U.N.T.S 171 (1980) (Israel signed and ratified the convention on Mar. 22, 1995 and it has ratified four out of five protocols additional to the convention, all except for the third protocol which deals with incendiary weapons); The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 U.N.T.S. 45 (1993) (Israel signed the treaty on Jan. 13, 1993 but did not ratify it) [hereinafter: *The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*]; The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti–Personnel Mines and on their Destruction, 36 I.L.M. 1507 (1997) (Israel is not a Party to this convention); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, U.N. Doc. A/54/49, Vol.III (2000) (Israel signed the protocol on Nov. 14, 2001 and ratified it on Jul. 18, 2005); The Convention on Cluster Munitions, G.A. Res. 63/71, Annex I, U.N. Doc. A/63/PV.61 (2008) (Israel is not a Party to this convention).

two types of armed conflict, international[17] and non–international,[18] which differ in the level of hostilities required to meet the threshold of armed conflict. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor v. Dusko Tadić* (hereinafter: the *Tadić* case) recognized the different thresholds for the existence of an armed conflict depending on its type:

> [A]n armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[19]

International humanitarian law also applies to situations of belligerent occupation.[20] The conduct of the armed forces in an occupied territory is

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17 See: Common Article 2 of the GENEVA CONVENTIONS, *supra* note 3: 'The present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance' (For Israel's position on Common Article 2 see *supra* note 12). See also: Article 1(4) of FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13: 'The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self–determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co–operation among States in accordance with the Charter of the United Nations'. As previously noted, Israel is not Party to the First Additional Protocol and does not consider this Article to reflect customary international law. See: *MAG's Testimony*, *supra* note 15; For further reading on international armed conflicts see: A. P. V. ROGERS, LAW ON THE BATTLEFIELD (3rd ed., 2012); LESLIE GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2nd ed., 2000) [hereinafter: GREEN, THE CONTEMPORARY LAW].

18 See: Common Article 3 of the GENEVA CONVENTIONS, *supra* note 3: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties...'; See also: Article 1 of SECOND ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 14: 'This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. Israel is not a Party to the Second Additional Protocol and does not consider it to reflect customary international law. For further reading on non–international armed conflicts see: ANTHONY CULLEN, THE CONCEPT OF NON–INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW (2010); LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT (2002).

19 Prosecutor v. Tadić, ICTY Case No. IT–94–1–A, App. Ch., para. 70 (Oct. 2, 1995) [hereinafter: *Tadić* case].

20 See: Common Article 2 of the GENEVA CONVENTIONS, *supra* note 3.

governed by a special set of laws within international humanitarian law. Article 42 of the Hague Regulations defines occupation:

> Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[21]

This definition requires that the Occupying Power 'effectively control' territory to which it does not have sovereign title.[22] The Occupying Power, through the military administration that it sets up, exercises the powers that are necessary to maintain law and order and ensure security while complying with its obligations towards the local population, especially respecting their protected status and the rights deriving from this status.[23]

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21 See: Hague Convention (IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, Article 42 (1907) [hereinafter: HAGUE REGULATIONS].

22 See: GERHARD GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 29 (1957); EYAL BENVENISTI, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 4 (2nd ed., 2004) [hereinafter: BENVENISTI, BELLIGERENT OCCUPATION]; Hans–Peter Gasser, *Protection of the Civilian Population*, *in* FLECK (ed.), THE HANDBOOK, *supra* note 4, at 237, 274. See also: *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission* REPORT PART ONE, at para. 46 (2011) [hereinafter: THE COMMISSION'S FIRST REPORT], where the Commission adopted the accepted position in international law that 'occupation' 'does not merely require military forces to be stationed in a certain territory, but also that the occupying power performs the functions of an existing government'. This position is also expressed in: Case Concerning Armed Activities on the Territory of the Congo (*D.R.C. v. Uganda*) 2005 I.C.J. 116, para. 231 (December 19) [hereinafter: *Congo v. Uganda* case]. For a different position see: COMMENTARY ON THE IV GENEVA CONVENTION OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF THE CIVILIAN PERSONS IN TIME OF WAR, Article 6, 60–61 (Pictet ed., 1958) [hereinafter: COMMENTARY ON THE IV GENEVA CONVENTION] where it was emphasized that there is no *de jure* intermediate stage between entering a foreign territory and entering a situation of occupation and that the application of the rules regulating the conduct of hostilities, 'even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets'.

23 See also: THE COMMISSION'S FIRST REPORT, *supra* note 22, at para 185: 'military forces have always had to deal with civilians, including during the policing of occupied territories when carrying out their international humanitarian law responsibilities to maintain public order and safety'. See: HAGUE REGULATIONS, *supra* note 21, at Articles 42–45, 47–56; GENEVA CONVENTIONS, *supra* note 3, at Articles 27–45, 51–78. These Articles state, *inter alia*, that the commander of the armed forces in an occupied territory enters into the role of the sovereign from whom the territory was conquered and he therefore holds all the authorities which were up to that point in the hands of the sovereign, i.e., the legislative, executive and judicial authorities. The commander is also obligated by a series of administrative duties that relate to law enforcement, maintaining public order and ensuring the safety of the inhabitants of the territory. See also: ICRC REPORT, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY, 17–26 (TRISTEN FERRARO ed., 2012); Kenneth Watkin, *Use of Force during Occupation: Law Enforcement and Conduct of Hostilities*, 94 (885) IRRC REV. 267 (2012) [hereinafter: *Watkin, Use of Force*].

6. There are a number of fundamental principles that guide international humanitarian law. Primarily, this body of law is based on a carefully crafted balance between two conflicting interests that Parties to the conflict possess when engaged in armed conflict, namely, the principles of military necessity and humanity. The notion was famously captured in the preamble to the Hague Convention, which states that the Convention is 'inspired by the desire to diminish the evils of war, as far as military requirements permit'.[24] Second, the principle of 'distinction'[25] permits attacks on military objectives (individuals and objects)[26] while prohibiting attacks directed against civilians and against civilian

24 See: HAGUE REGULATIONS, *supra* note 21, at Article 3; See also for example: Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, 18 Martens Nouveau Recueil (ser.1) 474 (1868); Article 22 of the Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 32 Stat. 1803 (1899); FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 35(1).

25 The ICJ recognized the principle of distinction as constituting one of the two foundational rules of international humanitarian law and as reflecting customary law see: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 78: 'The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non–combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets...'. See also: *Congo v. Uganda* case *supra* note 22 at para. 208.

26 If an individual satisfies the definition of combatant status they have the right to take part in hostilities. Consequently, the individual becomes a legitimate target and is not immune from attack. Moreover, a combatant enjoys the protection of the *Geneva Convention* (prisoner of war ('POW') status upon capture and immunity from prosecution for lawful acts of war). Combatants must fulfill the strict criteria set out in THIRD GENEVA CONVENTION, *supra* note 3, at Article 4A2 and FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 43. In addition to combatants, international humanitarian law permits attacks against civilians 'directly participating in hostilities' in certain circumstances [hereinafter: DPH]. See: *Id.*, at Article 51(3). This Article reflects customary law (CIHL, *supra* note 6, at 3–8). The distinction between protected civilians and civilians who directly participate in hostilities, and who lose their protection for such time as they do so, is complex. For an examination of the position of the Israeli Supreme Court on this issue, see: HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel*, 62(1) 507 (2006), at paras. 30–40 of President Barak's judgment [hereinafter: *Targeted Killing* case]. In 2009, the ICRC formulated a guidance examining DPH in the context of targeting. See: International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Feb. 26, 2009), *available at:* www.icrc.org/eng/assets/files/other/icrc–002–0990.pdf. For critiques and responses to aspects of the ICRC Guidance see: Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U.J. INT'L L. & POL. 641 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U.J. INT'L L. & POL. 697 (2010); Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U.J. INT'L L. & POL. 741 (2010); Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise and Legally Incorrect*, 42 N.Y.U.J. INT'L L. & POL. 769 (2010); Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques on the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U.J. INT'L L. & POL. 831 (2010).

objects.[27] Third, according to the principle of 'proportionality', even if an attack is directed against a lawful target, it will still be unlawful if the expected incidental harm to civilians or to civilian objects ('collateral damage') is excessive in relation to the concrete and direct military advantage anticipated.[28]

2. International Human Rights Law

7. International human rights law imposes binding obligations upon States to protect the rights of individuals. While the international legal order regulates the protection of human rights to some extent, generally these rights are reflected in the domestic legal system. The preamble of the 1948 Universal Declaration of Human Rights, the earliest international instrument dedicated to increasing respect for human rights, reflects the motivation for the development of legal obligations:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...[29]

In the decades following the adoption of the Universal Declaration, the modern corpus of international human rights law continued to develop. Among the founding treaties of this body of law are the International

27 International humanitarian law provides a negative definition of civilian: 'A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian'. See First Additional Protocol to the Geneva Conventions, *supra* note 13, at Article 50.

28 See: First Additional Protocol to the Geneva Conventions, *supra* note 13, at Article 51(5)(b), which incorporates the principle of proportionality in international humanitarian law and forbids any attack which: 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.

29 See: Universal Declaration of Human Rights, G.A. Res. 217A (III). U.N. Doc. A/810 (1948). The ICJ recognized the Declaration as reflecting the basic principles of human rights drawn from the UN Charter itself. See: Case Concerning United States Diplomatic and Consular Staff in Tehran (*Iran v. U.S.A.*), 1980 I.C.J. 3, para. 91 (May 24).

Covenant on Civil and Political Rights[30] and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966.[31] Other important conventions adopted since then include the International Convention on the Elimination of Racial Discrimination, the International Convention on the Elimination of all forms of Discrimination Against Women, the Convention Against Torture, and the Convention on the Rights of the Child.[32]

8. In addition to these international treaties, regional conventions on human rights have also been adopted, imposing obligations for those States which are Parties to them. Such treaties include the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: The European Convention for Human Rights), the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.[33] These regional conventions established their

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30 See: The International Covenant on Civil and Political Rights, 31 U.N.T.S 269 (1966) (Israel signed the covenant on Dec. 19, 1966, and ratified it on Oct. 3, 1991 [hereinafter: *The International Covenant on Civil and Political Rights*]. It should be noted that Article 28 of this Covenant established the Human Rights Committee, whose functions include ensuring the enforcement of the Covenant. The Committee is responsible for examining various States' adherence to human rights obligations by way of periodic reports, the publishing of general interpretive comments on Articles of the Covenant, and also examining individual complaints with regard to alleged violations of the Covenant by State Parties to the First Additional Protocol to the Covenant. The ICJ has held that special weight should be given to the interpretive case law and General Comments of the Human Rights Committee as an independent body that was established specifically to supervise the application of this Covenant. See: Case Concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), 2010 I.C.J. 103, para. 66 (November 30) [hereinafter: *Diallo* case].

31 See: The International Covenant on Economic, Social and Cultural Rights 993 U.N.T.S 3 (1966) [hereinafter: *The International Covenant on Economic, Social and Cultural Rights*] (Israel signed the covenant on Dec. 19, 1966 and ratified it on Oct. 3, 1991).

32 See: The International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S 195 (1965) (Israel signed the convention on Mar. 7, 1966 and ratified it on Oct. 3, 1979) [hereinafter: *The International Convention on the Elimination of All Forms of Racial Discrimination*]; Convention on the Elimination of all Forms of Discrimination Against Women, 1249 U.N.T.S 13 (1981) (Israel signed the convention on Jul. 17, 1980 and ratified it on Oct. 3, 1991); Convention on the Rights of the Child, 1577 U.N.T.S N 3 (1989) (Israel signed the convention on Jul. 3, 1990 and ratified it on Oct. 3, 1991) [hereinafter: *The Convention on the Rights of the Child*]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S 85 (1984) (Israel signed the convention on Oct. 22, 1986 and ratified it on Oct. 3, 1991) [hereinafter: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*]. See also: International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006) (Israel signed the convention on Mar. 31, 2007 and ratified it on Sep. 10, 2012); International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006) (Israel is not a Party to this convention).

33 See: European Convention for the Protection of Human Rights and Fundamental Freedoms, 312

own dedicated courts to rule on individual or State applications alleging violations of convention rights.[34] The International Court of Justice has relied, *inter alia*, on the jurisprudence of these courts as support for its own findings on the content of the rights set forth in the International Convention on Civil and Political Rights.[35]

9. Both the international and regional conventions enumerate a list of basic civil and political rights, which the International Court of Justice has recognized as reflecting a 'universal nature'.[36] These include, *inter alia*, the right to life, the right to due process, the prohibition against torture or cruel, inhuman or degrading treatment, and the protection of personal freedoms. Notwithstanding their primary goal of ensuring the basic protection of human rights, the conventions nonetheless allow States to derogate from certain human rights in specific circumstances in which the State's vital interests are implicated.[37] Such derogation is permitted, for example, during a 'time of public emergency which threatens the life of the nation'.[38] The derogation must be public, necessary, temporary, proportionate and non–discriminatory.[39] It should be noted that only some rights can be derogated from but other rights, for example, the right to life and the prohibition on torture, are non–derogable .[40]

U.N.T.S 221 (1950) [hereinafter: *The European Convention for the Protection of Human Rights and Fundamental Freedoms*]; American Convention on Human Rights, 1144 U.N.T.S 123 (1969) [hereinafter: *The American Convention on Human Rights*]; The African Charter on Human and Peoples' Rights, 21 I.L.M 58 (1981) [hereinafter: *The African Charter on Human and Peoples' Rights*] (Israel is not a Party to these conventions).

34 See: *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 33, at Article 19; *The American Convention on Human Rights*, *Id.*, at Article 33; Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Article 1 (1998).

35 See for example: *Diallo* case, *supra* note 30, at para. 68.

36 See: Barcelona Traction, Light and Power Company, Limited (*Belgium v. Spain*), 1970 I.C.J. 3, para. 34 (February 5).

37 See: *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 4; *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 33, at Article 15; *The American Convention on Human Rights*, *Id.*, at Article 27.

38 See: *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 4.

39 See: Human Rights Committee, General Comment 29: *States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

40 See for example: *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 4(3).

The Interaction Between International Humanitarian Law and International Human Rights Law

10. The various rules that apply in the context of an armed conflict (international humanitarian law) and in the context of law enforcement (international human rights law) are generally clear. However, there is less clarity in identifying applicable rules in 'mixed situations' where these two bodies of law both apply.

11. There is disagreement among international bodies and jurists concerning the relationship between the two sets of laws and the extent of their applicability in various situations. The extraterritorial application of international human rights law has been endorsed by the International Court of Justice,[41] other judicial and multilateral fora,[42] and by scholars.[43]

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41 In its advisory opinion regarding the wall, the ICJ adopted the approach that the obligations stipulated in *The International Covenant on Civil and Political Rights*, *supra* note 30, in *The International Covenant on Economic, Social and Cultural Rights*, *supra* note 31, and in *The Convention on the Rights of the Child*, *supra* note 32, apply to Israel also in its operations in the West Bank (see: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, paras. 109–113 (July 9) [hereinafter: *The Wall Opinion*]). It should be emphasized that this determination by the ICJ was based on the position that 'the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying power'. In *Congo v. Uganda* case, *supra* note 22, at paras. 179–180 and 216–217, the ICJ went a step further when it implicitly recognized the extraterritorial application of these human rights conventions also in cases of a short–term occupation; See also: Georgia v. Russian Federation, Request for the Indication of Provisional Measures, 2008 I.C.J 941, para. 109 (October 15).

42 The Human Rights Committee has endorsed its application see: Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 15, 18 (2004) [hereinafter: *General Comment 31 of the Human Rights Committee*]; Lopez Burgos v. Uruguay, HRC Communication No. R.12/52, U.N. Doc. A/36/40 176, para. 12.1–12.3 (1981); Celiberti de Casariego v. Uruguay, HRC Communication No. 56/1979, U.N. Doc. CCPR/C/13/ D/56/1979, para. 10.1 (1981); Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee with regards to Israel, U.N. Doc. CCPR/CO/78/ISR, para. 11 (2003). The European Court of Human Rights has endorsed its application, see for example: McCann and Others v. United Kingdom, App. No. 18984/91, Eur. Ct. H.R., para. 145–148, 161 (1995) [hereinafter: *McCann* case]; Loizidou v. Turkey, App. No. 15318/89, Eur. Ct. H.R., para. 56–64 (1995); Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R., para. 77 (2001); Issa and Others v. Turkey, App. No. 31821/96, Eur. Ct. H.R., para. 66–75 (2004) [hereinafter: *Issa* case]; Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R., para. 91 (2005); The Inter–American Court of Human Rights and the Inter–American Commission of Human Rights have also endorsed its application, see for example: Coard et al. v. United States of America, Case No. 10.951, Inter–Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106 Doc. 3 rev., para. 37 (1999); Alejandre v. Cuba, Case No. 11.589, Inter–Am. C.H.R., Report No. 86/99, OEA/ Ser.L/V/II.106 Doc. 3 rev., para. 23–25 (1999).

43 See for example: Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary 41–43 (2005); Noam Lubell, Extraterritorial Use of Force against Non–State Actors 193–235 (2010); Marco Sassoli, *The Role of Human Rights and International Humanitarian Law in New Types of*

As stated in this Commission's First Report, the extent to which this body of law applies extraterritorially is not universally accepted.[44] Nonetheless, the Commission is of the view that in certain circumstances human rights law applies extraterritorially.

12. The International Court of Justice addressed the interaction between international humanitarian law and international human rights law in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (hereinafter: the *Nuclear Weapons Advisory Opinion*). The Court held that the two sets of laws apply in parallel and that the right of the individual not to be arbitrarily deprived of life applies also during hostilities.[45] The extent to which the right applies is determined by the *lex specialis derogat lex generalis* ('*lex specialis*'), where the specialized rule overrides the general law.[46] In the *Nuclear Weapons Advisory Opinion*, international humanitarian law was characterized as the *lex specialis* of armed conflict and can therefore override international human rights law (*lex generalis*):

> The Court observes that the protection of the International Covenant of (sic) Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived

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Armed Conflicts, *in* INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 63–66 (Orna Ben Naftali ed., 2011); Matthew Happold, *Banković v. Belgium and the territorial scope of the European Convention on Human Rights*, 3(1) H.R. L. REV. 77 (2003).

44 See: THE COMMISSION'S FIRST REPORT, *supra* note 22, at para. 186. It should be noted that the US position, as reflected in para 186, should also be read in light of: Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (Dec. 30, 2011), paras. 504–505, *available at:* http://ushrnetwork.org/sites/default/files/declaration–treaty/ICCPR_Fourth_Periodic_Report.pdf ('...The United States is mindful that in General Comment 31 (2004) the Committee presented the view that State Parties are required by Article 2, paragraph 1, to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party...').

45 See: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 25.

46 The reasoning behind the ICJ's approach to the dual application of these two sets of can be seen in: *Congo v. Uganda* case, *supra* note 22, at para. 218; *The Wall Opinion*, *supra* note 41, at para. 109–113.

> of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[47]

In subsequent case law the International Court of Justice has unequivocally endorsed that an interaction exists between international humanitarian law and international human rights law. In its *Advisory Opinion regarding the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter: the *Advisory Opinion regarding the Wall*) the Court held:

> As regards the relationship between international humanitarian law and human rights law there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[48]

13. More specifically, in the *Advisory Opinion regarding the Wall*, the Court further developed its approach on the appropriate interaction between international human rights law and international humanitarian law in the context of Israel's responsibility as an Occupying Power in the West Bank:

> In order to answer the question put to it, the Court will have to take into consideration both these branches of international

47 See: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 25.

48 See: *The Wall Opinion*, *supra* note 41, at para. 106. This approach was also adopted in *Congo v. Uganda* case, *supra* note 22. paras. 216–220.

law, namely human rights law and, as *lex specialis*, international humanitarian law. [49]

Therefore, while human rights law does not exclusively govern the duties of the occupier, it is widely accepted that some human rights norms apply to varying degrees during occupation.[50] Conceptually, legally and practically, the relationship between the military administration and the inhabitants of the occupied territory is closer to the one that exists between the State and its citizens than to the one that exists between a State that is a Party to an armed conflict and the citizens of the other Party.

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49 See: *The Wall Opinion*, *supra* note 41, at para. 106. It should be noted that in several judgments, the Israeli Supreme Court has applied international human rights law to the military administration in the West Bank, without expressly adopting the position of the ICJ on the extraterritorial application of the international human rights conventions. See, for example: HCJ 3239/02 *Marab v. IDF Commander in the West Bank*, 57(2) 349, 360 (2003); HCJ 3278/02 *The Center for the Defense of the Individual founded by Dr. Lota Salzberger v. Commander of the IDF Forces in the West Bank*, 57(1) 285, 296 (2002); HCJ 1890/03 *Bethlehem Municipality v. State of Israel – Ministry of Defense*, 59(4) 736, 755 (2005); HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel*, 60(2) 477, 492, 500, 506, 523 (2005) [hereinafter: *Mara'abe* case], where the Court held in para. 57 that: 'The ICJ determined that in addition to the humanitarian law, the conventions on human rights apply in the occupied territory. ... For the purposes of our judgment in this case, we assume that these conventions indeed apply'. Dinstein views the Court's decision not to expressly reject the ICJ's approach as evidence that the conventions should be applied in the West Bank (see: YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 71 (2009) [hereinafter: DINSTEIN, BELLIGERENT OCCUPATION].

50 The Human Rights Committee has taken this approach in relation to Israel's treaty obligations, see: *supra* note 42; the European Court of Human Rights has adopted this position in regards to the Turkish occupation of North Cyprus, *Id.*; and the ICJ has also taken this approach in a series of cases, see *supra* note 41. In the academic literature, three different approaches have arisen in assessing the relevant normative framework applicable to occupied territory:

(1) Only international human rights law applies in occupied territory, on the basis of the duty of the Occupying Power prescribed in Article 43 of the Hague Regulations to maintain order and public life in an occupied territory. This duty that is carried out by means of policing and law enforcement operations (see for example: Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Power*, 16 EUR. J. INT'L. L. 661, 665 (2005); For the position that human rights applies as the *lex specialis* during occupation see: William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L. L. 741 (2005)).

(2) Only international humanitarian law applies in occupied territory, and it constitutes the *lex specialis* that applies in the territory by virtue of the Hague Regulations and the Fourth Geneva Convention (see for example: Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L. L. 119 (2005))

(3) A 'mixed situation' applies to the occupied territory, in which the two normative regimes, human rights law and the international humanitarian law, apply in parallel. It should be noted that the term 'mixed situation' has been given various interpretations see, for example: DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 49, at 99–101; Kenneth Watkin, *Maintaining Law and Order during Occupation: Breaking the Normative Chains*, 41 ISR. L. REV. 175, 192 (2008) [hereinafter: *Watkin, Maintaining Law and Order*]; Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16(4) EUR. J. INT'L. L. 695, 710 (2005). For discussion of the effect of a prolonged occupation on the applicable law, see also: Orna Ben–Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 105 (2003–2004).

14. In sum, the Commission takes the position that the interaction between international humanitarian law and international human rights law is complementary.[51] The Commission addressed the question of this interaction in the First Report and noted that it is often forgotten in this complex debate that both normative regimes have a common core of basic standards that should be applied at all times.[52] Indeed, as noted in the First Report, 'international humanitarian law reflects many of the norms that are also recognized as being a part of human rights law'.[53] Thus, for example, Article 75 of the First Additional Protocol, which is gradually being recognized as having customary status,[54] describes in general terms the basic rights of 'persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol' such as certain 'due process' rights, separate detention for men and women, etc.[55] As already noted, some human rights are so fundamental as to be non–derogable in all circumstances. However, international human rights law concedes that in times of emergency it is

51 This position was adopted by the Supreme Court; See, for example, *Targeted Killing* case, *supra* note 26, at para. 18; *Mara'abe* case, *supra* note 49, at para. 57 of President Barak's judgment; HCJ 3969/06 *Alharov v. IDF Commander in West Bank* (still unpublished, Oct. 22, 2009), at paras. 10–11 of President Beinisch's judgment: 'The powers of the Military Commander derive from the rules of international law that govern a belligerent occupation. ... It is sometimes possible to supplement the humanitarian provisions with international human rights law'.

52 See: THE COMMISSION'S FIRST REPORT, *supra* note 22, at para. 185; FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 72: 'The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Geneva Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to *the protection of fundamental human rights during international armed conflict*' [emphasis added]. It should also be noted that, according to Dinstein: 'Customary human rights are conferred on human beings wherever they are'; See: DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 49, at 70–71. See also: Frankin Guillermo Aisalla Molina (Ecuador–Colombia), Inter–state Petition IP–02 on Admissibility, Inter–Am. C.H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, para. 117 (2010) [hereinafter: *Molina* case] ('In common with other universal and regional human rights instruments, the American Convention and the 1949 Geneva Conventions share a common core of non–derogable rights and the mutual goal of protecting the physical integrity and dignity inherent in the human being').

53 See: THE COMMISSION'S FIRST REPORT, *supra* note 22, at para. 185.

54 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 75; CIHL, *supra* note 6, at 432; *Hamdan v. Rumsfeld*, 548 U.S. 557, 71 (2006), where the majority opinion established that article 75 is a part of customary humanitarian law. It should also be noted that in 2011 the US State Department stated that it will adhere to the set of norms set out in Article 75. See: Secretary of State Clinton, Press Statement, Reaffirming America's Commitment to the Humane Treatment of Detainees (Mar. 7, 2011), *available at:* www.state.gov/secretary/rm/2011/03/157827.htm; See also: William Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L. L. 319, 322 (2003).

55 FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 75.

possible to derogate from certain other rights in the face of genuine security needs.[56]

In situations of armed conflict, international humanitarian law is the *lex specialis*. In situations involving traditional law enforcement activities during armed conflict the *lex generalis* of international human rights law applies, in order to fill a *lacuna* in international humanitarian law. The Commission is of the view that certain human rights norms apply to supplement international humanitarian law rather than the separate normative regime of human rights law replacing international humanitarian law.[57] Should it become necessary to use force against civilians during these activities (e.g., using force to stop looting by civilians or otherwise to maintain law and order), human rights norms regulating the use of force apply, including the principles of necessity and proportionality (these terms are defined differently in a law enforcement context from the way in which they are defined in international humanitarian law).[58] This is particularly so in a situation of occupation. Note, however, there may be operations during armed conflict which lie on the borderline between combat actions and law enforcement activity. Examples include taking control of inhabited buildings, searches, and erecting temporary barriers. In such situations the question of the interaction between the two sets of laws becomes more complex.

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56 See *supra*, at para. 9; International humanitarian law also recognizes the option to derogate: COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTION OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICT, Article 72, para. 2933 (Sandoz et al. eds., 1987) [hereinafter: COMMENTARY ON THE FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS] ('Therefore it is to be foreseen that States will frequently use the possibility available to them to suspend the application of these agreements [ICCPR, ECHR, ACHR, etc.] for the duration of the armed conflict; thus only the clauses which permit no derogation remain applicable').

57 For an extension of this issue see: *Watkin, Use of Force*, *supra* note 23, at 304–310.

58 According to the principle of necessity in human rights law the use of force is permitted only when non–violent options have been exhausted and have proven to be insufficient, and only to the extent needed in order to enforce the law or in order to guarantee the safety of the law enforcement officers. The principle of proportionality in human rights law establishes that the prevention of the foreseen harm, must not exceed the damage caused by the actual use of force (for example, the use of deadly force is not be permitted in order to protect insignificant property, but it is permitted to prevent murder or in self–defense). See: UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.144/28/Rev.1, Article 9 (1990) [hereinafter: UN Basic Principles, Use of Force and Firearms 1990]. See also: Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 U.N G.A.O.R Supp. No. 46, U.N. Doc. A/34/46, Article 2–3 (1979).

3. International Criminal Law

15. In addition to international humanitarian law and international human rights law, international criminal law is a third body of law that establishes responsibility when a substantive rule has been breached.

16. International criminal law establishes individual criminal responsibility over various categories of proscribed behavior, primarily, war crimes, crimes against humanity, acts of genocide, and crimes of aggression.[59] The main treaty sources include the 1907 Hague Regulations, the Geneva Conventions (and their additional protocols) and the 1948 Genocide Convention.[60] These and other treaties form the basis for many of the crimes within the jurisdiction of the international criminal tribunals and the Rome Statute of the International Criminal Court (hereinafter: *Rome Statute*).[61]

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59 For additional readings on this body of law see: Antonio Cassese, International Criminal Law (2nd ed., 2008) [hereinafter: Cassese, International Criminal Law]; See also: Claus Kreß, *International Criminal Law*, *in* Max Planck Encyclopedia of Public International Law, para. 15–18 (2009), *available at:* www.mpepil.com [hereinafter: Kreß *in* Planck]; For reading about the history of the development of international criminal law see: Routledge Handbook of International Criminal Law 5–107 (Schabas & Bernaz eds., 2011) [hereinafter: Routledge Handbook].

60 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S 277 (1948) (Israel signed the convention on Aug. 17, 1949 and ratified it on Mar. 9, 1950) [hereinafter: *The Convention on the Prevention and Punishment of the Crime of Genocide*].

61 See: Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, Articles 12, 13 (1998) [hereinafter: *Rome Statute*]. However, the crimes in the Rome Statute are not derived solely from preexisting treaty law and represent a significant expansion of the Court's subject matter jurisdiction. It should be emphasized that in addition to the substantive law, international criminal law provides a series of procedural rules that concern the framework for conducting criminal proceedings. At the center of these rules lies the question of the jurisdiction of domestic courts and the various international criminal tribunals, in prosecuting these offenses. In this context, it is important to note that Israel is not a Party to the *Rome Statute*. This does not, however, mean that the Court will never enjoy jurisdiction over matters involving Israel or Israelis. This may occur in a number of scenarios: where an Israeli citizen has a foreign nationality of a State that is a Party to the *Rome Statute* or of a State which accepts the Court's jurisdiction with respect to the crime in question; where the State in whose territory an Israeli citizen committed an offense is a Party to the *Rome Statute* or accepts the Court's jurisdiction with respect to the crime in question; or where the Security Council authorizes the Court to try a matter where the suspect is an Israeli national. For further reading on the jurisdiction of the ICC over Non–Member States, and in particular Israel, see: Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non–Parties: Legal Basis and Limits*, 1 JICJ 618 (2003); Yaël Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non–State Entities*, 8 JICJ 3 (2010); Yuval Shany, *In Defense of Functional Interpretation of Article 12(3) of the Rome Statute A Response to Yaël Ronen* 8 JICJ 329 (2010). For a discussion of Universal Jurisdiction, see: *fn* 121.

17. The importance of the principle of individual criminal responsibility was first articulated in the judgment of the Nürnberg Tribunal: 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[62] Since the Nürnberg Trials, the principle has been codified in the treaties already identified, and it is unquestionably a principle accepted as customary international law and has been repeatedly reaffirmed by the UN Security Council.[63]

4. Law of State Responsibility

18. The last body of law relevant to the formation of the duty to examine and investigate violations of international humanitarian law is the law of State responsibility. While international criminal law determines individual responsibility for violations of substantive rules, this body of law, as its name suggests, focuses on State responsibility for international wrongs. According to the doctrine of State responsibility, whenever a State (or its agents) commits an internationally wrongful act, the State is responsible for that violation of international law and is liable for redress.

19. The principal source of the law of State responsibility is the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter: ILC Articles),[64] which are, in part, reflective of customary law.[65] Article 2 of the ILC Articles defines the

62 See: Judgment of the International Military Tribunal, *reprinted in* Nazi Conspiracy and Aggression: Opinion and Judgment 53 (United States Government Printing Office, 1947).

63 See, for example, the following Security Council resolutions: Security Council Res. 1970, U.N. Doc. S/RES/1970 (2011); Security Council Res. 1820, U.N. Doc. S/RES/1829 (2008); Security Council Res. 1546, U.N. Doc. S/RES/1546 (2004); Security Council Res. 1264, U.N. Doc. S/RES/1264 (1999); Security Council Res. 1203, U.N. Doc. S/RES/1203 (1998); Security Council Res. 955, U.N. Doc. S/RES/955 (1994); Security Council Res. 827, S/RES/827 (1993).

64 See: International Law Commission, *Articles and Commentaries on Responsibility of States for Internationally Wrongful Acts*, Annex G.A. Res. 56/83, U.N. GAOR Sess. 56, Supp. No. 10, U.N. Doc. A/56/10, p.59 (2001) [hereinafter: ILC Articles]. The rules were first drafted in 1981, and updated in 2001, when they were adopted in a resolution without a vote by the General Assembly.

65 See for example: Application of the Convention on the Prevention and Punishment of the Crime of

elements for an internationally wrongful act of a State:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> a. is attributable to the State under international law; and
>
> b.constitutes a breach of an international obligation of the State.[66]

When a State has committed an internationally wrongful act, according to the ILC Articles, it may be liable for 'cessation and non–repetition',[67] 'restitution',[68] 'compensation',[69] or 'satisfaction'.[70]

20. The same unlawful act might amount to violations under both international criminal law and the law on State responsibility, albeit with separate and distinct liabilities for individuals and for the State concerned. An illustrative example involved the Srebrenica massacre. While Slobodan Milošević was on trial before the International Criminal Tribunal for the Former Yugoslavia for, *inter alia*, two counts of genocide for his alleged involvement at Srebrenica, Bosnia Herzegovina submitted an application to the International Court of Justice alleging Serbia's international legal responsibility for violations of its obligations under the Genocide Convention.[71]

Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), 2007 I.C.J. 138, p. 142–153 (February, 3) [hereinafter: *Bosnia v. Serbia* case]; See also Caron: 'The ILC articles represent (at best) a restatement of the customary international law of the secondary principles of state responsibility'. (David Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT'L. L. 857, p. 872 (2002) [hereinafter: *Caron, State responsibility*]).

66 See: ILC Articles, *supra* note 64, at Article 2.

67 *Id.*, at Article 30.

68 *Id.*, at Article 35.

69 *Id.*, at Article 36.

70 *Id.*, at Article 37.

71 See: *Bosnia v. Serbia* case, *supra* note 65, at paras. 377–450; See also: Prosecutor v. Milošević, ICTY Case No. IT–02–54, Initial Indictment (Bosnia), para. 32 (Nov. 22, 2001); *The Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 60, Article 1, 5–6.

B. Sources of the Duty to Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law ('Why Investigate?')

21. The obligation to respond to alleged violations of international humanitarian law is derived from various sources. In this section we will review international humanitarian law (applicable to both international and non–international armed conflict), international human rights law, international criminal law and the law on State responsibility in so far as they apply to situations of armed conflict. As will be seen from all of these sources, the obligation to examine and investigate alleged violations of international humanitarian law is an established and recognized obligation in international law.

1. The Source of the Obligation in International Humanitarian Law

22. All Parties to an armed conflict have a general obligation to respect and ensure respect for international humanitarian law.[72] To give effect to the general obligation, States are specifically obliged to criminalize certain violations of international humanitarian law,[73] but that is not the only measure required. Military commanders must also act both proactively and reactively to ensure compliance with the law.[74] The Commission considers that these legal obligations can only be satisfied through proper accountability processes. First there is a general duty to broadly *examine* all suspected violations of international humanitarian law. Second there is an additional duty to *investigate* certain types of alleged violations known

72 See: Common Article 1 of the Geneva Conventions, *supra* note 3.

73 See: Fourth Geneva Convention, *Id.*, at Article 146 and equivalent provisions; First Additional Protocol to the Geneva Conventions, *supra* note 13, at Article 85.

74 First Additional Protocol to the Geneva Conventions, *supra* note 13, at Article 87.

as 'war crimes'. The distinction between these duties, together with the sources upon which they are based, will be explained below. Often there is overlap between the sources from which they derive.

A. Examine

23. The rationale for the obligation to examine all alleged violations of international humanitarian law is to ensure compliance with this body of law and its effective implementation during military operations.[75] States are obliged to undertake complementary means to facilitate compliance with the rules of international humanitarian law. These include dissemination and educational activities, appropriate military training, reporting duties, disciplinary measures and other actions.

The obligation to examine alleged violations of international humanitarian law is fundamental to the attainment of the general objective of compliance. Violations of the law are to be prevented but, if they do occur, States are obliged to hold those responsible accountable.[76] Article 146 of the Fourth Geneva Convention (as well as the other three Geneva Conventions and the First Additional Protocol) imposes a general duty to prevent all violations of international humanitarian law ('suppress').[77] 'Suppression'

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75 See for example: *Id.*, at Article 87, as well as COMMENTARY ON THE FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 56, at 1017–1023; *2004 Physicians for Human Rights* case, *supra* note 12, at para. 34 of President Barak's judgment: 'According to the humanitarian rules of international law, military activity has the following two requirements: *first*, that the rules of conduct should be taught to all combat soldiers and internalized by them, from the Chief of General Staff down to the private; *second*, that institutional arrangements are created to allow the implementation of these rules and putting them into practice during combat'; Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 IS. L. REV. 2, 92, 99 (2006). The duty to ensure compliance with international humanitarian law is also imposed directly on commanders; see the FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 87(2); For a review of the tools available for a commander to ensure compliance, see: Renaut Céline, *The Impact of Military Disciplinary Sanctions on Compliance with International Humanitarian Law*, 90 IRRC 870 (2008).

76 See: The FIRST GENEVA CONVENTION, *supra* note 3, at Article 52; SECOND GENEVA CONVENTION, *Id.*, at Article 53; THIRD GENEVA CONVENTION, *Id.*, at Article 132; FOURTH GENEVA CONVENTION, *Id.*, at Article 149.

77 See: The FIRST GENEVA CONVENTION, *supra* note 3, at Article 49; SECOND GENEVA CONVENTION, *Id.*, at Article 50; THIRD GENEVA CONVENTION, *Id.*, at Article 129; FOURTH GENEVA CONVENTION, *Id.*, at Article 146. See also: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 86(1).

of violations requires States to ensure compliance with international humanitarian law in its entirety and to prevent future violations from being committed or repeated.[78] Examination *post factum* focuses attention on the importance of abiding by and enforcing international humanitarian law *ab initio*.

B. Investigate

24. Article 146 of the Fourth Geneva Convention imposes an additional obligation to search and bring to trial those allegedly responsible for certain types of violations of the Convention ('repress'):

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[79]

The obligation to 'repress' violations includes the adoption of penal or disciplinary sanctions, usually through the enactment of criminal legislation, and also searching for, trying and punishing convicted perpetrators of serious violations. This obligation is not restricted merely to the nationals and servicemen of a Party to a conflict, but applies to every

78 See: COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 22, at 590–594.

79 See: The FOURTH GENEVA CONVENTION, *supra* note 3, at Article 146.

State in relation to every person present in its territory who is suspected of having committed such violations.[80] Article 85 of the First Additional Protocol adopts the same approach towards the duty to 'repress' violations (albeit with an expanded list of offenses).[81]

25. In relation to the nature of the violations, it can be deduced from the Commentary on the Geneva Conventions that the obligation to investigate and commit for trial the perpetrators of breaches is not limited merely to those grave breaches defined as such in the Conventions, but includes all breaches of international humanitarian law that amount to 'war crimes'.[82] The international criminal tribunals and the Rome Statute have also expanded the category of war crimes beyond grave breaches (for a discussion on the definition of war crimes, see below paragraphs 39–44). Furthermore, Rule 158 of the International Committee of the Red Cross's Study on Customary International Law (hereinafter: the ICRC Study) discusses the existence of express customary obligations to investigate and commit for trial perpetrators of all breaches of international humanitarian law that amount to 'war crimes':

> States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate,

80 See: COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 22, at 592–593.

81 FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 85; See also: Claus Kreß, *Reflections on the Iudicare Limb of the Grave Breaches Regime*, 7 J. INT'L CRIM. JUST. 789, 794 (2009) [hereinafter: *Kreß, Reflections on the Iudicare*].

82 See: COMMENTARY ON THE FIRST GENEVA CONVENTION OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF THE CIVILIAN PERSONS IN TIME OF WAR, Article 49, 367–368 (Pictet ed., 1958) where it was noted that: 'Article 29 of the 1929 Convention called for the punishment of 'all' acts contrary to the provisions of the Convention, and there could be no question of the Diplomatic Conference of 1949 not going as far as in 1929... It is thus clear that 'all' breaches of the present Convention should be repressed by national legislation. At the very least, the Contracting Powers, having arranged for the repression of the various grave breaches and fixed an appropriate penalty for each, must include a general clause in their national legislative enactments, providing for the punishment of other breaches of the Convention. Furthermore, under the present paragraph the authorities of the Contracting Parties should issue instructions in accordance with the Convention to all their subordinates, and arrange for judicial or disciplinary proceedings to be taken in all cases of failure to comply with such instructions'. See also: Yuval Shany & Amichai Cohen, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, YIHL, 5–8 forthcoming, *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1982201 [hereinafter: Shany & Cohen, *Beyond the Grave Breaches*] see the updated citation in Chapter B para 2 *fn* 5; Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT. SEC. J. 31, 38 (2011) [hereinafter: *Schmitt, Investigating Violations*].

> prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.[83]

As to violations of international humanitarian law falling short of this threshold, the separate duty to 'examine' is consistent with the obligation to 'suppress'.

The Obligations of Military Commanders and Other Superiors

26. The exercise of effective military authority is fundamental to ensuring compliance with the law. International humanitarian law recognizes the central role of commanders and other superiors in the context of military operations. Subordinate military forces must know that their commanders and other superiors will respond effectively to violations of international humanitarian law. Failure to do so entails legal responsibility for the military commanders and other superiors as well as for the perpetrators themselves.[84] Commanders and other superiors have a general obligation to prevent violations of international humanitarian law and to take measures to ensure that appropriate steps are taken in response to suspected violations. These obligations are expressly articulated in the First Additional Protocol, which addresses the responsibility of superiors (including civilian leaders) for violations committed by their subordinates, their duty to act to prevent potential violations, and, when and as appropriate, report violations or initiate disciplinary or criminal proceedings:

> The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of

83 See: CIHL, *supra* note 6, rule 158 (at 607–611), as well as Schmitt's position on the customary status of the rule: *Schmitt, Investigating Violations*, *supra* note 82, at 44. It should also be further noted that rule 161 of the CIHL (at 618–622), which refers to Article 88 of the First Additional Protocol to the Geneva Convention, determines that in relation to the investigation of serious violations: 'States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects'.

84 See: First Additional Protocol to the Geneva Conventions, *supra* note 13, at Article 86(2).

> the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.[85]

Thus, in obligating superiors to prevent and punish alleged violations, Articles 86 and 87 of the First Additional Protocol further develop the distinction between 'suppress' and 'repress'.[86] The Commentary on Article 87 of the First Additional Protocol provides that commanders' obligations include actions such as writing a report on the circumstances of the incident, imposing (or recommending) an appropriate disciplinary sanction, and, where necessary, referring the matter to the appropriate authorities.[87] In a study of the duty to investigate breaches of international law in armed conflict, Professor Michael Schmitt states that this obligation extends throughout the chain of command.[88]

The obligation of commanders has also been recognized in statutes establishing the international criminal tribunals,[89] rulings of various

85 See: *Id.*, at Article 87(1). See also: *Id.*, at Articles 86–87, which were recognized as reflecting customary law (see: CIHL, *supra* note 6, at 556–563); Prosecutor v. Akayesu, ICTR Case No. ICTR–96–4–T–A, T. Ch. I, paras. 490–491 (Sep. 2, 1998); Prosecutor v. Kayishema and Ruzindana, ICTR Case No. ICTR–95–1–T, T. Ch., para. 213–216 (May 21, 1999) [hereinafter: *Kayishema and Ruzindana* case]; Prosecutor v. Aleksovski, ICTY Case No. IT–95–14/1–T, App. Ch., para.76 (Mar. 24, 2000); Prosecutor v. Delalić, ICTY Case No. IT–96–21–T, T. Chamber II, para. 356 (Nov. 16, 1998); Prosecutor v. Delalić, ICTY Case No. IT–96–21–T, App. Ch., para. 196, 250, 354–363 (Feb. 20, 2001) [hereinafter: *Delalić* case]; The criminal liability of commanders and supervisors is also incorporated in the *Rome Statute* see in this context: *Rome Statute*, *supra* note 61, at Article 28.

86 See: First Additional Protocol to the Geneva Conventions, *supra* note 13, at Articles 86–87; See also: Commentary On The First Additional Protocol To The Geneva Conventions, *supra* note 56, at 1010–1011, at paras. 3538–3539.

87 See: Commentary On The First Additional Protocol To The Geneva Conventions, *supra* note 56, at 1023, at para. 3526.

88 See: *Schmitt, Investigating Violations*, *supra* note 82, at 43.

89 See: Statute of the International Tribunal for the former Yugoslavia, S.C. Res. 808 Annex, U.N. Doc. S/RES/808, Article 7(3) (1993) [hereinafter: *Statute of the International Tribunal for the former Yugoslavia*]; Statute of the International Tribunal for Rwanda, S.C. Res. 955 annex, U.N. Doc. S/RES/955, Article 6(3) (1994) [hereinafter: *Statute of the International Tribunal for Rwanda*]; *Rome Statute*, *supra* note 61, at Article 28(a).

international tribunals since 1945,[90] the ICRC Study[91] and military manuals of various States.[92] Of particular importance in this regard is the Rome Statute, which specifically addresses in depth the responsibility of commanders and other superiors.[93] **The Commission is satisfied that, as a matter of both treaty and customary international law, commanders and other superiors have an obligation to ensure that suspected violations (a standard examined below) of international humanitarian law are appropriately examined and investigated. Commanders and other superiors must also take appropriate remedial, disciplinary or penal measures, or ensure that they are taken by others, in response to confirmed violations. This responsibility extends throughout the chain of command.**

Examination and Investigation During Non–International Armed Conflict

27. Having addressed the issue of the obligation to examine and investigate in the context of international armed conflict, we shall now turn to address this obligation with regards to a non–international armed

90 See for example: Prosecutor v. Blaškić, ICTY Case No. IT–95–14–A, App. Ch., para.69 (Jul. 29, 2004) [hereinafter: *Blaškić* case]; Prosecutor v. Halilović, ICTY Case No. IT–01–48–T, T. Ch. I, para. 39 (Nov. 16, 2005) [hereinafter: *Halilović* case]; Prosecutor v. Jean–Pierre Bemba Gombo, ICC Case No. ICC–01/05–01/08, Pt. Ch. II, para. 402–443 (Jun. 15, 2009) [hereinafter: *Bemba* case]; Prosecutor v. Boškoski and Tarčulovski, ICTY Case No. IT–04–82–T, T. Ch. II, para. 418 (Jul. 10, 2008) [hereinafter: *Boškoski and Tarčulovski* case]. It should be noted that in the *Boškoski and Tarčulovski* case, the ICTY discussed the practical interpretation of the doctrine of 'command responsibility' and held that: 'A superior's duty to punish the perpetrators of a crime may encompass an obligation to conduct an effective investigation with a view to establishing the facts. The obligation to investigate translates into an obligation on the part of the superior to take active steps to ensure that the perpetrators will be punished. To that end, the superior may exercise his own powers of sanction, or if he lacks such powers, report the perpetrators to the competent authorities. It has been held in the jurisprudence of the Tribunal that civilian superiors, who may lack the disciplinary or sanctioning powers of military commanders, may discharge their obligation to punish by reporting to the competent authorities whenever a crime has been committed if these reports are likely to trigger an investigation or initiate disciplinary or criminal proceedings'.

91 See: CIHL, *supra* note 6, rule 152 (at 556–558): 'Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders'; As well as rule 153 (at 558–563): 'Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible'.

92 See for example: DEP'T OF THE ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE, para. 501, (Jul. 18, 1956).

93 See: *Rome Statute*, *supra* note 61, at Article 28.

conflict.[94] It should be noted that the duty to examine and investigate violations of international humanitarian law is not mentioned in Common Article 3 of the Geneva Conventions, or in the Second Additional Protocol.[95] The Commission, however, is of the opinion that there is no longer a difference between the law of international and non–international armed conflicts with regard to the existence of an obligation to examine and investigate imposed on the territorial State and the State of nationality of the suspect.[96] The Commission has arrived at this conclusion based on the following factors: first, Article 149(3) of the Fourth Geneva Convention (as well as an equivalent provision in the other three Conventions) states that there is an obligation to suppress *all* acts contrary to the Conventions (including, it may be assumed, acts contrary to Common Article 3).[97] Second, the preamble to the Rome Statute recognizes a customary duty of States to investigate all crimes under international law, including war crimes committed in non–international armed conflicts.[98] Third, the question of commanders' responsibility for committing their subordinates for trial for violations of international humanitarian law is also included in the Statute of the International Criminal Tribunal for Rwanda, which

94 The records to the discussion that took place at the diplomatic conference for the revision of the Geneva Conventions between 1974–1977 reveal the reluctance of representatives of the drafting States to enshrine the rules that apply to non–international armed conflicts. Although a group of States, led by Norway, India and Iraq, called for drafting a single protocol, which would determine identical rules for armed conflict irrespective of the classification of the conflict, the majority position preferred that a distinction be made between the set of laws that apply to international armed conflicts and those that apply to non–international armed conflicts. For additional reading, see: Sylvie S. Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29 (1983).

95 See: *Schmitt, Investigating Violations*, *supra* note 82, at 48.

96 See: *Kreß, Reflections on the Iudicare*, *supra* note 81, at 794–795; *Tadić* case, *supra* note 19, in the separate opinion of justice Abi–Saab, para. 6.

97 See: FIRST GENEVA CONVENTION, *supra* note 3, at Article 52; SECOND GENEVA CONVENTION, *Id.*, at Article 53; THIRD GENEVA CONVENTION, *Id.*, at Article 132; FOURTH GENEVA CONVENTION, *Id.*, at Article 149.

98 See: *Rome Statute*, *supra* note 61, at the preamble, para. 6. It should also be noted that there is considerable similarity between the list of offenses that constitute war crimes in international armed conflicts (Article 8(2)(a–b)) and the parallel list of offenses in non–international conflicts (Article 8(2)(c–f)). Furthermore, during the June 2010 Kampala Review Conference on the Rome Statute of the International Criminal Court a resolution was adopted to limit even further the gaps between the lists of offenses. The Review Conference also emphasized that 'the abovementioned relevant elements of the crimes [in international armed conflicts] can also help in their interpretation and application in armed conflict not of an international character'. See: ICC Review Conference of the Rome Statute, RC/Res.5 Concerning amendments to Article 8 of the Rome Statute, 13 (Jun. 10, 2010), *available at:* www.icc–cpi.int/iccdocs/asp_docs/ASP9/OR/RC–11–Part.II–ENG.pdf [hereinafter: *Summary report of the Review conference on the Rome Statute of the International Criminal Court, Kampala 2010*].

regulates the prosecution of war criminals in an armed conflict that is not international.[99] Fourth the general trend that emerges from the rulings of courts and tribunals is to impose the rules of international humanitarian law on conflicts that are not international.[100] Fifth, the duty imposed on States in any case by virtue of the principle that conventions should be complied with (*pacta sunt servanda*) enshrined in Article 26 of the Vienna Convention on the Law of Treaties.[101] Finally, the obligation to investigate alleged war crimes in both international and non–international armed conflict can be derived from, for example, Article V of the Convention on the Prevention and Punishment of the Crime of Genocide,[102] Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict[103] and Article 7(1) of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.[104] The international crimes contained in each of these treaties apply regardless of the specific context in which they are committed.

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99 See: *Statute of the International Tribunal for Rwanda*, *supra* note 89, at Article 6(3).

100 In recent decades, in case law and academic literature, the trend suggests that it is now perceived to be custom that many rules for international armed conflicts apply to non–international armed conflicts. The consequence has been to apply the law applicable to international armed conflicts by analogy to non–international armed conflicts. See: *Tadić* case, *supra* note 19, at para. 109–127; CIHL, *supra* note 6, at xvi; THE COMMISSION'S FIRST REPORT, *supra* note 22, at para. 42. It should be noted that this trend has been subject to much debate (see, for example: Sandesh Sivakumaran, *Re–Envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219 (2011); Gabriella Blum, *Re–Envisaging the International Law of Internal Armed Conflict: A Reply to Sandesh Sivakumaran*, 22 EUR. J. INT'L. L 265 (2011); Sandesh Sivakumaran, *Re–Envisaging the International Law of Internal Armed Conflict: A Rejoinder to Gabriella Blum*, 22 EUR. J. INT'L L. 273 (2011)).

101 See: Vienna Convention on the Law of Treaties, 1155 U.N.T.S 331, Article 26 (1969), which provides that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Schmitt deduces from the requirement of compliance in good faith that a broad interpretation should be given to the investigation obligations enshrined in treaty law applicable to international armed conflicts concerning suspected violations of international humanitarian law, so that it also relates to suspected violations that occur in non–international armed conflicts. For more on this issue see: *Schmitt, Investigating Violations*, *supra* note 82, at 48.

102 See: *The Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 60, at Articles 1, 4–6.

103 See: *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 16, at Article 28; See also: Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, 38 I.L.M 769, Articles 15–17 (1999) (Israel is not a Party to this protocol).

104 See: *The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, *supra* note 16, at Article 7(1).

28. **Based on a review of the sources, the Commission is satisfied that as a matter of customary international humanitarian law, States have a duty to investigate complaints and claims regarding war crimes and examine all other violations. This obligation applies to both international armed conflicts and non–international armed conflicts.**

2. The Source of the Obligation in International Human Rights Law

29. An additional area of law relevant for investigating certain activities during an armed conflict is international human rights law. Most of the principal international human rights law treaties, apart from the Convention against Torture,[105] do not include an express provision requiring the investigation of alleged violations. The obligation to investigate violations of human rights law is usually deduced from the general obligation 'to uphold and guarantee' human rights and from the right for 'effective remedy' by a competent authority.[106]

The obligation to investigate has often been reaffirmed in case law, particularly cases involving alleged violations of the right to life, as well as in other general human rights instruments. For example, in *General*

105 See: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 32, at Articles 6–8.

106 Thus, for example, *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 2: '1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant; 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted'.

Comment No. 31 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (the International Covenant on Civil and Political Rights), the Human Rights Committee stated that:

> There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. ... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[107]

Another expression of this interpretation can be found in the judgment of the European Court of Human Rights in *McCann and others v. United Kingdom*:

> The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention," also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.[108]

30. Moreover, additional reference to the international human rights law obligation to investigate can be found in 'soft law' instruments.[109] The

107 See: *General Comment 31 of the Human Rights Committee*, *supra* note 42, at paras. 15 and 18.

108 See: *McCann* case, *supra* note 42; Other examples of rulings by the European Human Rights Court on this issue include: Kaya v. Turkey, App. No. 22947/93, 22948/93, Eur. Ct. H.R., para. 105 (Oct. 10, 2000) [hereinafter: *Kaya* case]; Isayeva, Yusupova and Bazayeva v. Russia, Apps. Nos. 57947/00, 57948/00, 57949/00, Eur.Ct. H.R, para. 208–213 (2005) [hereinafter: *Isayeva, Yusupova and Bazayeva* case]; A similar approach was adopted in rulings by the Inter–American Court of Human Rights, see for example: Velásquez–Rodríguez v. Honduras, Inter–Am. Ct. H.R. (Ser. C), No. 4, para.161–172 (Jul. 29, 1988) [hereinafter: *Rodríguez v. Honduras* case].

109 See for example: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Articles 6, 11(f), 22–23; Principles on the Effective Prevention and Investigation of Extra–legal, Arbitrary and Summary Executions as Recommended by the Economic and Social Council in Resolution 1989/65, Supp. No. 1, Annex, U.N. Doc. E/1989/89, Articles 9, 10, 11 (1989) [hereinafter: ESCOR Principles, Effective Prevention and Investigation 1989]; *General Comment 31 of the Human Rights Committee*, *supra* note 42, at paras. 15 and 18.

UN established international standards governing the use of force in law enforcement, and these include the accountability of law enforcement agents.[110] For example, the *United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* require strict accountability for the use of firearms. The principles call on governments and law enforcement agencies to 'ensure that an effective review process is available' and to report any incident of death or injury caused by the use of force 'promptly to the competent authorities'.[111] Those affected by the alleged violation (or their legal representatives) must enjoy access to an independent, judicial process, and, in the event of their death, the right applies to their dependents.[112] Similar accountability requirements can be found in the *UN Principles on the Effective Prevention and Investigation of Extra–Legal, Arbitrary and Summary Executions*. The Principles call for an investigation of all suspected cases of extra–legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death. The 'purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death'.[113]

31. **In summary, although an explicit obligation to investigate alleged human rights violations can rarely be found in human rights conventions, various international bodies and other 'soft law' sources have interpreted the substantive rights and the general obligation to ensure the realization of human rights to include, *inter alia*, the obligation to investigate human rights violations. The Commission accepts this interpretation, and in particular the requirement to investigate immediately following the use of lethal force in a law enforcement context.**

110 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 1.

111 See: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22.

112 *Id.*, at Article 23.

113 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 9.

3. The Source of the Obligation in International Criminal Law

32. A third area of law relevant for investigating certain activities during an armed conflict is international criminal law. Normally, international crimes are expected to be tried, first and foremost, at the domestic level, whereas it is envisioned that international courts would assume jurisdiction only when the national system fails or needs to be induced to exercise its powers properly.[114] The general principle that a domestic system enjoys priority is expressed in two notions of international criminal law, namely complementarity and subsidiarity, which both emphasize the primacy of an examination and investigation by the national justice system.[115]

33. Article 17 of the Rome Statute ('Admissibility') enshrines the principle of complementarity. It reflects the trend in international criminal law according to which an international court will serve as the last resort when States cannot or will not themselves carry out their obligation to investigate and prosecute:

> 1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:
>
> (a) *The case is being investigated or prosecuted by a State which has jurisdiction over it*, unless the State is *unwilling* or *unable*

114 See for example: Robert Cryer et al., An Introduction to International Criminal Law 64 (2010) [hereinafter: Cryer, Introduction]: 'International crimes are primarily intended to be prosecuted at the domestic level'. In certain cases, however, the principle of complementarity is dismissed and primacy is given to the international tribunals over the national courts of all States. One example of this can be found in the jurisdiction of the *ad hoc* criminal tribunals established by the Security Council in the 1990s, see: *Statute of the International Tribunal for the former Yugoslavia*, *supra* note 89, at Article 9(2); *Statute of the International Tribunal for Rwanda*, *Id.*, at Article 8(2). An additional model is mixed tribunals, whose composition, jurisdiction, methods of financing, prosecutors and defendants, incorporate both international and national dimensions. Courts of this kind were established, for example, in Sierra Leone, Cambodia, Iraq and Lebanon. For further reading on mixed tribunals see: Shaw, International Law, *supra* note 5, at 417–430; Cassese, International Criminal Law, *supra* note 59, at 330–336.

115 For further reading on the relationship between the principle of complementarity and the principle of subsidiarity see: Claus Kreß, *Universal Jurisdiction Over International Crimes and the Institut de Droit International*, 4 J. Int'l Crim. Just. 3, 561, 579 (2006).

genuinely to carry out the investigation or prosecution;

(b) *The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned*, unless the decision resulted from the *unwillingness or inability* of the State *genuinely* to prosecute;

2. *In order to determine unwillingness in a particular case*, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the *purpose of shielding* the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;

(b) There has been an *unjustified delay in the proceedings* which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) *The proceedings were not or are not being conducted independently or impartially*, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. *In order to determine inability in a particular case*, the Court shall consider whether, due to a *total or substantial collapse or unavailability of its national judicial system*, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[116]

Naturally, Article 17 of the Statute is relevant to acts that are defined by the Rome Statute such as war crimes, crimes against humanity, the crime of genocide, (and in the future, also the crime of aggression).[117] For the

116 See: *Rome Statute*, *supra* note 61, at Article 17 [emphases added].

117 The jurisdiction of the Court over the crime of aggression is enshrined in the *Rome Statute*, *supra* note

purposes of this analysis, when a State exercises its authority to investigate violations of international humanitarian law of a certain type – namely, the alleged commission of war crimes – the matter becomes inadmissible in proceedings before the International Criminal Court.[118] Therefore, the Court will only intervene where it is possible to determine that the State is *unwilling* (i.e., the proceedings in the State were initiated with the intent of shielding the suspect; there has been an unjustified delay in the proceedings which is inconsistent with an intent to bring the person concerned to justice; the proceedings were not conducted independently or impartially and in a manner which is consistent with an intent to bring the person concerned to

61, at Article 5(d). However, this jurisdiction was suspended until after States Parties approved a definition of this crime. On Jun. 11, 2010, resolution RC/Res.6 was adopted which defined aggression and set out the conditions for exercising jurisdiction over this crime. See *Summary report of the Review conference on the Rome Statute of the International Criminal Court, Kampala 2010*, *supra* note 98, at 17. The *Rome Statute* has been amended to incorporate the definition of the crime of aggression (Article 8 *bis*) and the bases for the exercise of the Courts's jurisdiction over it (Article 15 *bis*).

118 One issue that has arisen in relation to the duty to investigate is the question of whether the State is obliged to adopt the international criminal law codex, including replicating Articles 6–8 of the *Rome Statute*, *supra* note 61, into domestic legislation. In the *Lubanga* case the Court held that 'it is a condition *sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass *both the person and the conduct* which is the subject of the case before the Court' [emphasis added] (see: Prosecutor v. Lubanga, ICC Case No. ICC–01/04–01/06–8–US–Corr, Decision on the Prosecutor's Application for a Warrant of Arrest, Pt. Ch. I, para. 58 (Feb. 10, 2006)). By adopting this approach the ICC took the view that the national criminal legislation should condemn the conduct rather than the specific crime for which the accused is tried in the parallel ICC proceeding. Thus, it can be deduced from this ruling that it is sufficient if domestic legislation accurately reflects the range of criminal activities enshrined in the *Rome Statute*. In this respect, the judgment rejects the Hard–Mirror thesis which requires the indictment of an international crime rather than a translation of that crime into an 'ordinary crime' from domestic law. This thesis was originally incorporated in the *Statute of the International Tribunal for the former Yugoslavia*, *supra* note 89, Article 10(2), and in particular by the ICTY in the *Tadić* case, *supra* note 19, para. 58; in the *Statute of the International Tribunal for Rwanda*, *supra* note 89, Article 9(2); as well as in the ILC Draft Statute for an International Criminal Court, Article 42 (see: Draft Statute for an International Criminal Court, Report of the ILC on the work of its forty–sixth session, G.A.O.R Supp. No. 10, U.N. Doc. A/49/10 (1994)). The rejection of this thesis by the Court in the *Lubanga* case corresponds to the position of the drafting States in the discussions during the Rome Conference and the position expressed by the ICC prosecutor's office: 'There is no requirement that the crimes charged at the national proceedings have the same 'label' as the ones before this Court. The Statute does not set out to regulate how States may choose to incorporate crimes within the jurisdiction of the Court into their national legal system. Therefore there may be discrepancies in the way a particular act is criminalized under the Rome Statute and under national law'. See: John Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 57–58 (Lee ed., 1999); Prosecution Response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, OTP ICC–01/11–01/11 (Jun. 5, 2012); Claus Kreß, *The Principle of Complementarity under the Rome Statute of the International Criminal Court: A Legal Opinion Submitted to the Israeli Independent Public Commission to Examine the Maritime Incident of 31 May 2010, headed by Supreme Court Justice Jacob Turkel* 43–46 (Aug. 16, 2011) *available at:* http://www.turkel–committee.gov.il/files/wordocs/Manuskript.pdf [hereinafter: *Kreß, The Principle of Complementarity*].

justice) or *unable* (due to a total or substantial collapse or unavailability of its national judicial system) to carry out the investigation (or prosecution) *genuinely*.[119] The principle of complementarity, as recognized in the Rome Statute, is based on sound considerations of legal policy and signifies the importance that international criminal law attributes to the State's compliance with its obligation to investigate, and the consequences that follow from a failure to carry out that obligation.[120]

34. The principle of subsidiarity applies the same test (i.e., the 'unwilling or unable' test) in determining the applicability of the universal jurisdiction of bystander States.[121] Subsidiarity recognizes the real possibility of competing claims to jurisdiction and prioritizes territory and nationality over universality. While the principle of complementarity has been enshrined in the Rome Statute through its preambular provisions,[122] the principle of subsidiarity has not yet been codified and its customary status remains debatable.[123] National prosecution and judicial authorities have recently

119 *Rome Statute*, *supra* note 61, at Article 17. For an detailed examination of the different bases for the principle of complementarity as they are incorporated in Article 17 of the Statute see: *Kreß, The Principle of Complementarity, supra* note 118, at 43–46.

120 For further reading on the rationales and policy considerations that underlie the principle of complementarity, see: JANN KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 57–99 (2008) [hereinafter: KLEFFNER, COMPLEMENTARITY]; Christoph Bughard, *Complementairty as Global Governance*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY FROM THEORY TO PRACTICE, VOL. I, 167–197 (Stahn & El Zeidy eds., 2011).

121 Universal jurisdiction refers to the jurisdiction of a national court to try an individual for an international crime, without there being any connection between the State where the proceeding is taking place and the crime that is the subject of the proceeding. The first case to address universal jurisdiction was the *Eichmann* case in Israel. The District Court held that: 'The abhorrent crimes defined in this Law [Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, LA 57] are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offenses against the law of nations itself ('delicta juris gentium')… in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal' (CF (Jerusalem) 61/40 *Attorney–General v. Eichmann*, 45, 3, 12 (1961)). See also: *CA Eichmann*, *supra* note 6, at 2039–2065. The rules that govern the application of universal jurisdiction have been discussed in various sources: CIHL, *supra* note 6, rule 157 (at 604–607); The Princeton Principles on Universal Jurisdiction, formulated by the participants of the Princeton Project at the Princeton University Program in Law and Public Affairs (Macedo ed., 2001), *available at:* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf; as well as in The Institute of International Law, 17th Commission, Universal Jurisdiction With Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (Aug. 26, 2005), *available at:* www.idi–iil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

122 *Rome Statute*, *supra* note 61, at the Preamble: 'emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'.

123 See: *Kreß, The Principle of Complementarity*, *supra* note 118, at 37–38; Jo Stigen, *The Relationship*

applied the principle of subsidiarity to favor the State in whose territory or by whose citizens the alleged offense was committed over a third State claiming universal jurisdiction.[124] Thus, it can be concluded that universal jurisdiction cannot be relied on when the State possessing either territorial jurisdiction or personal jurisdiction is willing and able to prosecute the alleged offense.

35. Another aspect of international criminal law relevant to the duty to investigate is the doctrine of 'command responsibility'. A breach of the obligation imposed on officers and superiors to investigate effectively violations committed by their subordinates may itself be a breach of international criminal law and a basis for a criminal conviction.[125] This

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between the Principle of Complementairty and the Exercise of Universal Jurisdiction for Core International Crimes, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES, 133–142 (Bergsmo ed., 2010) [hereinafter: *Jo Stigen, Complementairty and the Exercise of Universal Jurisdiction*]; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VIRG. J. INT'L. L. 81, 89 (2001); The AU–EU Expert Report on the Principle of Universal Jurisdiction, EU Doc. 8672/1/09, REV 1 (Apr. 16, 2009), *available at:* http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf. The International Court of Justice has not made a determination as to the existence of a subsidiarity criterion, however, in the *Arrest Warrant* case, Justices Higgins, Kooijmans and Buergenthal addressed the matter in their Joint Separate Opinion. The Justices noted that a State contemplating bringing criminal charges based on universal jurisdiction must first offer the national State of the prospective accused the opportunity to act upon the charges concerned. See: Case Concerning Arrest Warrant of Apr. 11, 2000 (Democratic Republic of the Congo v. Belgium), Joint Separate Opinion of Judges Higgins, Koojimans and Burgenthal, 2002 I.C.J 3, paras. 54–59 (Feb. 14, 2002).

124 The trend of applying the principle of subsidiarity to favor the State holding territorial or personal jurisdiction is reflected in series of recent domestic cases and legislation, in particular in Spain. See: National Criminal Court, Case of Spanish Citizens who Disappeared in Argentina, Court Order No. 5 (May 11, 1998) as translated by Angel Sanchez Legido, *Spanish Practice in the Area of Universal Jurisdiction*, 8 SPANISH YB. INT'L. L. 17, 38 (2001–2002); Tribunal Supremo, Feb. 25, 2003, Case No. 327–2003, section II, para. 6, *available at:* www.derechos.org/nizkor/guatemala/doc/gtmsent.html; Audiencia Nacional, Preliminary Proceedings No. 157/2008 (May 4, 2009), *available at:* www.pchgaza.org/files/PressR/English/2009/04–05–2009–2.html; See also: *The Committee of Solidarity with the Arab Cause et al. v. The Office of the Public Prosecutor* which dealt with a complaint concerning the death of civilians as a result of Israel's targeting of Salah Shehadeh. The Spanish Court of Appeal held that its universal jurisdiction would yield to the proceedings taking place in the State of Israel, namely the establishment, upon the recommendation of the Israeli Supreme Court, of the Inbar Commission (later, the Strasberg–Cohen Commission) to examine the incident (See: Special Committee for Examining the Targeted Killing of Salah Shehade REPORT (2011) (in Hebrew): www.pm.gov.il/NR/rdonlyres/DA339745–7D9F–40C7–B20F–4481AAF1F4C7/0/reportshchade.pdf). This decision was upheld by the Supreme Court of Spain (See: Tribunal Supremo, Sala de lo penal (Auto 550/2010), Appeal No. 1979/2009 (Mar. 4, 2010), *available at:* http://estaticos.elmundo.es/documentos/2010/04/13/auto_gaza.pdf). For further discussion on State practice in this area see: Cedric Ryngaert, *Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the prosecution of Core Crimes by states Acting Under the Universality Principle*, THE INSTITUTE OF INTERNATIONAL LAW, WORKING PAPER 98, 7–14 (2006), *available at:* www.law.kuleuven.be/iir/nl/onderzoek/wp/WP98e.pdf; *Jo Stigen, Complementairty and the Exercise of Universal Jurisdiction*, *supra* note 123, at 137–142.

125 For a detailed analysis on this issue in relation to the duty to investigate see: Yuval Shany, Amichai

obligation was recognized by the International Military Tribunal for the Far East in Tokyo,[126] and also by the US Military Commission in Manila during the trial of General Yamashita.[127] Similar obligations were also included in the statutes of the various international criminal tribunals, such as in Article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, which states that:

> The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[128]

An essentially identical Article also appears in the Statute of the International Criminal Tribunal for Rwanda.[129] The equivalent provision in Article 28 of the Rome Statute is more detailed in the articulation of the relevant test for criminal responsibility and it provides that:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for

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Cohen & Ido Rosenzweig, *Response Document Presented by the Researchers of the Israel Democracy Institute's "Terror and Democracy" Project to the Position Paper presented to the Commission by the Military Advocate General, regarding the investigation of International Humanitarian Law violation allegations* 26 (Feb. 10, 2011) [hereinafter: *Shany, Cohen & Rosenzweig, Response Document to the MAG position paper*].

126 See: United States et al v. Araki Sadao et al, *reprinted in* THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST WITH AN AUTHORITATIVE COMMENTARY AND COMPREHENSIVE GUIDE, Vol. 2, Indictment 13 (2002); See also: Gideon Boas, *Command Responsibility for the Failure to Stop Atrocities: The Legacy of the Tokyo Trial, in* BEYOND VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL REVISITED 163–183 (Tanka, McCormack & Simpson eds., 2011).

127 See: Trial of General Tomoyuki Yamashita, Case No. 21 (Apr. 4, 1946), *reprinted in* UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Vol. IV (1948).

128 See: *Statute of the International Tribunal for the former Yugoslavia*, *supra* note 89, at Article 7(3).

129 See: *Statute of the International Tribunal for Rwanda*, *supra* note 89, at Article 6(3).

> crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[130]

Even though the doctrine of command responsibility as expressed in Article 28 of the Rome Statute does not, as such, deal with the State's duty to investigate, it is clearly based on the assumption that such a duty exists. For the commander's duty to report a war crime 'to the competent authorities for investigation and prosecution' makes sense only insofar as those authorities are then required to act upon the report.

36. To conclude, the recent development of international criminal law has significantly contributed to the evolution and consolidation of a customary duty to investigate cases of alleged war crimes in both international and non–international armed conflicts. The customary rules governing the powers and duties of States to investigate alleged war crimes may be viewed as forming part of both international humanitarian law and international

130 See: *Rome Statute*, *supra* note 61, at Article 28(1); For further reading on the scope of the duty see: *Halilović* case, *supra* note 90, at paras. 39, 67–68; *Blaškić* case, *Id.*, at para. 69; *Bemba* case, *Id.*, at paras. 433–436; *Delalić* case, *supra* note 85, at paras. 238–239; *Boškoski and Tarčulovski* case, *supra* note 90, at paras. 413–414. For an analysis of command responsibility under Israeli law see: Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut (The Kahan Commission), reprinted *in* THE YITZHAK KAHAN BOOK: IN MEMORY OF SUPREME COURT PRESIDENT YITZHAK KAHAN, paras. 71, 75–78 (Menachem Elon ed., 1989) (Heb.).

criminal law.[131] Furthermore, international criminal law emphasizes the importance attributed to, and provides an incentive for, compliance with this duty.

4. The Source of the Obligation in the Law of State State Responsibility

37. The final area of international law relevant for investigating certain activities during armed conflict is the law on State responsibility. As previously stated, a breach of an international legal obligation, i.e., an international humanitarian law or international human rights law obligation, gives rise to international responsibility rendering the relevant State a duty either for 'cessation and non–repetition', 'restitution', 'compensation', or 'satisfaction'.[132]

131 See: Kreß *in* Planck, *supra* note 59, at paras. 10–14.

132 See: *Caron, State responsibility*, *supra* note 65.

Summary of the Various Sources of the Duty to Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law

38. **In sum, international humanitarian law, international human rights law, and international criminal law each establishes a duty to investigate. In international humanitarian law, for example, there is a duty to 'suppress', which involves an obligation to examine all violations of international humanitarian law, as well as a duty to 'repress', involving an obligation to investigate certain violations of international humanitarian law. These obligations are intended to ensure that militaries encourage and develop an internal culture of commitment, to and compliance with, the law. International human rights law requires the relevant authorities to investigate any use of force resulting in death or serious injury caused by State security forces. International criminal law, through the principle of complementarity, places the duty on States to investigate and bring to trial perpetrators of war crimes on States. It is also the case that the obligation to investigate stands on its own, in the sense that non–compliance with the obligation has legal consequences additional to those applicable to the immediate perpetrators of serious violations of international humanitarian law. The law of State responsibility attributes individual acts to the relevant State and renders that State liable for dealing with violations of the law.**

C. Violations of International Humanitarian Law that Require Examination or Investigation ('What to Investigate?')

39. We have established in paragraph 23 that there is an obligation to *examine* all alleged violations of international humanitarian law. However, only a violation of certain provisions of international humanitarian law demands criminal accountability.[133] Such violations constitute 'war crimes'.[134] We will now turn to the definition of 'war crimes' as it has developed in international law.

40. The precise definition of the term 'war crimes' has varied over time. Although in the past it was widely recognized that every violation of international humanitarian law was regarded as a 'war crime',[135] it is accepted today that only violations that reach a certain level of severity amount to 'war crimes'.[136]

As early as 1944, Professor Hersch Lauterpacht criticized the broad definition of 'war crimes':

> [D]oes every violation of a rule of warfare constitute a war crime?

133 See: Rüdiger Wolfum & Dieter Fleck, *Enforcement of International Humanitarian Law*, *in* Fleck (ed.), The Handbook, *supra* note 4, at 691: 'Each member of the armed forces who has violated the rules of international humanitarian law must be aware of the fact that he or she can be prosecuted according to penal or disciplinary provisions. This provision refers to every violation, both grave breaches and others. The consequences of a grave breach are always of a penal nature; other violations may be punished through disciplinary procedures'.

134 See: Green, The Contemporary Law, *supra* note 17, at 286; According to Green the definition of *war crimes* is based on the definition in Article 6(b) of the Nuremberg Charter (also called *The London Charter* (Charter of the International Military Tribunal, 82 U.N.T.S 280 (1945) [hereinafter: *Charter of the Nuremberg Military Tribunal*]): 'War Crimes are namely violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill–treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill–treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity'.

135 See: Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 229 (2004) [hereinafter: Dinstein, The Conduct of Hostilities].

136 See: Cryer, Introduction, *supra* note 114, at 272.

> It appears that, in this matter, textbook writers and, occasionally, military manuals and official pronouncements have erred on the side of comprehensiveness. They make no attempt to distinguish between violations of rules of warfare and war crimes. ... It is possible that one of the reasons for the failure to give effect to the decision to prosecute war criminals after the first World War was the extent of the list of offences … and the absence of a distinction between violations of international law and war crimes in the more restricted sense of the term.[137]

Lauterpacht suggested a narrower definition for 'war crimes':

> These may be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity.[138]

A codification of this approach is found in the Geneva Conventions and the First Additional Protocol, which describe breaches of certain provisions as 'grave breaches' and distinguish them from other, less serious, breaches. These grave breaches are subject to an established obligation to investigate and prosecute perpetrators.[139]

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137 See: Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 Brit. Y.B. Int'l. L. 58, 77 (1944).

138 *Id.*, at 79.

139 'Grave breaches' are defined in the First Geneva Convention, *supra* note 3, at Article 50; Second Geneva Convention, *Id.*, at Article 51; Third Geneva Convention, *Id.*, at Article 130; Fourth Geneva Convention, *Id.*, at Article 147. These breaches include, *inter alia*, a deliberate killing of a protected person; torture or inhumane treatment; including scientific or medical experiments on protected persons; deliberate causing of damage or great suffering or of serious injury to the body or health; wide–scale destruction of property without military necessity, which is done unlawfully and without restraint. The First Additional Protocol to the Geneva Conventions, *supra* note 13, at Article 85, adopted the list of 'grave breaches' provided in the Geneva Conventions and added to them, *inter alia*, the following: attacking targets in a manner that is likely to cause serious and unjustified harm to a civilian population; the perfidious use of the emblems of medical services; the transfer by the Occupying Power of its population into the occupied territory; an unjustifiable delay in the

41. While the Geneva Conventions and the First Additional Protocol limit the scope of war crimes to the 'grave breaches' of their provisions, it is clear that the scope of war crimes includes a broader range of violations of international humanitarian law. The Statute of the International Criminal Tribunal for the Former Yugoslavia, for example, includes 'grave breaches of the Geneva Conventions' in Article 2 and other violations of the 'laws or customs of war' in Article 3. In the *Tadić* case, the Appeals Chamber interpreted Article 3 of the Statute and defined four conditions that must be met in order for the Tribunal to assume jurisdiction. One of these conditions necessitates that the violation be '*serious*':

> The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:
>
> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143);
>
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

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repatriation of prisoners of war; apartheid practices and a deliberate attack on cultural or religious buildings. It should be noted that the grave breaches listed in the four Geneva Conventions are seen as reflecting customary law. See: CIHL, *supra* note 6, at 568–604.

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.[140]

In articulating the scope of Article 3 of the Statute, the Appeals Chamber was also reflecting the general statement of jurisdiction for the Tribunal incorporated in Article 1 – 'The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.[141] The four conditions articulated by the Appeals Chamber have been applied in subsequent decisions of the Tribunal.[142] The conditions set out in *Tadić* offer a useful framework for identifying 'serious violations' but the Commission acknowledges that debate exists regarding their exact scope.[143]

42. The definition of 'war crimes' in Article 8 of the Rome Statute is also broader than the category of 'grave breaches of the Geneva Conventions' (set out in Article 8(2)(a) of the Statute), and Articles 8(2)(b) and 8(2)(e) refer to 'other serious violations of the laws and customs' applicable in international armed conflicts and non–international armed conflicts respectively.[144] The

140 See: *Tadić* case, *supra* note 19, at para. 94.

141 See: *Statute of the International Tribunal for the former Yugoslavia*, *supra* note 89, at Article 1.

142 See, for example: Prosecutor v. Galić, ICTY Case No. IT–98–29–T, T. Ch. I, paras. 13–32 (Dec. 5, 2003); Prosecutor v. Galić, ICTY Case No. IT–98–29–A, App. Ch., paras. 90–98 (Nov. 30, 2006). The ICRC study also adopted the distinction in the *Tadić* case, *supra* note 19, according to which only the most serious violations of international humanitarian law will be regarded as war crimes ('States in fact limit war crimes to the more serious violations of international humanitarian law'). However, the ICRC further developed its interpretation of the concept of 'serious' by broadening its scope to include those violations that 'endanger protected persons or objects' or 'breach important values'. See: CIHL, *supra* note 6, at 568–570; See also: CRYER, INTRODUCTION, *supra* note 114, at 272.

143 There is no international agreement on the question of whether all of the war crimes enumerated in the *Rome Statute*, *supra* note 61, at Article 8, reflect customary law. See on this matter: DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 135, at 232–233.

144 See: *Rome Statute*, *supra* note 61, at Article 8.

Commission accepts that 'serious violations' of international humanitarian law are 'war crimes'.

43. It should also be noted that during an armed conflict other international crimes can occur in addition to war crimes, including 'genocide', 'crimes against peace'[145] and 'crimes against humanity',[146] but this Report will not focus on these additional categories of international crimes.

44. An additional matter for consideration when defining the term 'war crimes' is the identity of the perpetrator. Several international tribunals have determined that the commission of a war crime is not limited to commanders, combatants and other members of the armed forces but that even the acts of civilians, committed in the context of, and associated with, an armed conflict may amount to war crimes.[147] This

145 'Crimes against peace' were defined in the *Charter of the Nuremberg Military Tribunal*, *supra* note 134, at Article 6(a) in the following manner: 'namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. The term 'crime of aggression' serves, occasionally, as an alternative to the expression 'crimes against peace', and it is defined as part of the ICC's judicial jurisdiction. See *supra* note 117. For further reading on these crimes, see: CRYER, INTRODUCTION, *supra* note 114, at 312–328; ROUTLEDGE HANDBOOK, *supra* note 59, at 155–169.

146 Whereas war crimes and the crime of genocide have undergone a process of codification in a series of constitutive documents, there is no uniform definition of 'crimes against humanity' in international criminal law. In recent years, however, a greater degree of coherence on its definition and its main characteristics has emerged in the case law. It has referred to particularly odious offenses in that they constitute a serious attack on human dignity or grave humiliation or degradation of one or more persons. These offenses must be carried out as a part of a government policy or widespread and systematic practice towards a civilian population. For further reading, see: CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 59, at 98–123; CRYER, INTRODUCTION, *supra* note 114, at 230 –267; and ROUTLEDGE HANDBOOK, *supra* note 59, at 121–139.

147 See: Prosecutor v. Akayesu, ICTR Case. No. ICTR–96–4–T, App. Ch., paras. 443–444 (Jun. 1, 2001) [hereinafter: *Akayesu* case]: 'The Appeals Chamber is of the view that the minimum protection provided for victims under common Article 3 implies necessarily effective punishment on persons who violate it. Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal. … The Trial Chamber [in this case] found that the four Conventions "were adopted primarily to protect the victims as well as potential victims of armed conflicts". It went on to hold that "[t]he category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces"... In the opinion of the Appeals Chamber, the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute'. For a comprehensive analysis of this issue by the Appeals Chamber see paras 425–446. See also: Hadamar Trial, 1 LRTWC 53–54; the Essen Lynching Case, 1 LRTWC 88, and the Zyklon B Case, 1 LRTWC 103; *Kayishema and Ruzindana* case, *supra* note 85, at para. 175; Prosecutor v. Rutaganda,

development dismisses the 'public agent or government representative test' used to determine who can be held liable for serious violations of Common Article 3 to the Geneva Conventions. Thus, acts committed by the political echelons and civilian superiors may constitute war crimes.[148] The rationale behind this was explained by the Appeals Chamber of the International Criminal Court for Rwanda in *The Prosecutor v. Jean–Paul Akayesu*:

> ... international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category.[149]

45. **The Commission is satisfied that a legal obligation to undertake an *investigation* applies to those acts that constitute serious violations of international humanitarian law otherwise known as 'war crimes'. Furthermore, in order to ensure future compliance, there is an obligation to conduct some form of *examination* into violations of all other provisions of international humanitarian law.**

ICTR Case. No. ICTR–96–3–A, App. Ch., para. 440 (May 26, 2003); Prosecutor v. Musema, ICTR Case No. ICTR–96–13–T, App. Ch., para. 274 (Jan. 27, 2000).

148 It is not clear whether political leaders that supervise the military echelon (such as the Minister of Defense or the Prime Minister) are included in the first category of the THIRD GENEVA CONVENTION, *supra* note 3, at Article 4, which relates to soldiers in regular military service. However, insofar as a hierarchical commander–subordinate relationship exists between the political echelon and the military one, the political echelon will also be entitled to prisoner of war status (this was the position in the Noreiga case, in which the former ruler of Panama was entitled to prisoner of war status, see: *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992)). It follows that it is possible to consider members of the political echelon in certain cases as 'combatants', and as such their actions can fall within the scope of 'war crimes', even without extending the category of the identity of the perpetrators to one that also includes civilians. Additional support for this rationale can be found in the *Rome Statute*, *supra* note 61, at Article 27, which is entitled 'irrelevance of official capacity'. By virtue of this article, it follows that the jurisdiction of the Convention is not limited because of the immunity of heads of State and that international criminal liability will apply equally and without discrimination. See, for example, Kōki Hirota, Judgement, Record of Proceedings of the International Military Tribunal for the Far East (1946–1949), Vol. 20, 49, paras. 788–792, *reprinted in* THE TOKYO WAR CRIMES TRIAL (Pritchard & Zaide eds., 1981).

149 See: *Akayesu* case, *supra* note 147, at para. 443.

D. The Grounds for Carrying Out the Obligation to Examine and Investigate ('When to Investigate?')

46. In determining the grounds for carrying out the obligation to examine and investigate we will distinguish between the general duty to examine *every* violation of the rules of international humanitarian law and the specific duty to conduct an investigation. The Commission's approach is that the threshold required for an investigation is where a credible accusation[150] is made or a reasonable suspicion arises[151] that a war crime has been committed.[152] There is agreement among some scholars that there is no restriction on the source of a complaint or allegation, and it may come from State authorities, a private citizen, non–governmental organizations, etc.[153] Whether a reasonable suspicion of a war crime exists depends on the facts of the concrete event and its particular context. In certain cases, the facts of the matter are sufficient to indicate that the act allegedly committed is ostensibly of a criminal nature and, consequently, an investigation should be commenced immediately. Examples of cases of this kind include alleged violations of absolute prohibitions of international law, such as use

150 See: *Schmitt, Investigating Violations*, *supra* note 82, at 83.

151 The comparative survey conducted by the Commission (see: Annex C of this Report and Chapter B) indicates that most of the countries surveyed devised a threshold of reasonableness for triggering an investigation. For example, in the United States there must be 'credible information' that a suspected violation occurred; in Canada there must be a 'reasonable belief' that an offense has been committed; in Australia there must be a 'reasonable suspicion' that an offense has been committed; in the United Kingdom, a 'reasonable person' must become aware that an offense has been committed; in the Netherlands there must be a 'reasonable suspicion' that a criminal offense has been committed; in Germany there must be 'sufficient grounds' for suspicion that a criminal offense has been committed. It is also worth noting that 'reasonable suspicion' was recently adopted as the appropriate threshold for opening an investigation by the Israeli Supreme Court (See: HCJ 9594/03 *B'Tselem – Israeli Information Center for Human Rights in the Territories v. the Chief Military Prosecutor* (still unpublished, Aug. 21, 2011) [hereinafter: *B'Tselem* case]. For an in depth analysis on the triggering mechanisms for the duty to investigate See: *Shany & Cohen, Beyond the Grave Breaches*, *supra* note 82, at 13–17.

152 See: *Schmitt, Investigating Violations*, *supra* note 82, at 38–39; According to Schmitt: 'the Commentary [to the Fourth Geneva Convention] refers to the International Law Commission's 1954 *Draft Code of Offences against the Peace and Security of Mankind*'s inclusion of "acts in violation of the laws or customs of war". The reference implies that the duties set forth in the provisions are not limited to those articulated in the Conventions themselves, but extend to any war crimes'. See: Commentary on the IV Geneva Convention, *supra* note 22, Article 146, at 588.

153 See: *Schmitt, Investigating Violations*, *supra* note 82, at 38; See also: E*xamination and Investigation Duties Regarding Violations of the Laws of Armed Conflict that apply to the State of Israel* 1–8 (legal opinion submitted to the Commission by Prof. Eyal Benvenisti, Apr. 13, 2011), at 15 [hereinafter: *Benvenisti Opinion*].

of civilians as 'involuntary human shields',[154] rape,[155] looting,[156], or a willful attack against civilians.[157] The common denominator of these cases is that international law does not recognize any circumstances that justify their occurrence, and therefore credible information suggesting their occurrence in itself gives rise to a reasonable suspicion that a war crime has been committed.

On many occasions, however, the question of the criminality of an act depends upon the legal regime that governs the specific activity during armed conflict, and especially whether an operation is governed by the law regulating the conduct of hostilities (e.g., combat operations), or law enforcement norms (e.g., policing operations).

THE DUTY TO INVESTIGATE IN THE CONTEXT OF AN ARMED CONFLICT

47. As outlined in paragraph 6, in the context of an armed conflict a deliberate attack on a person may be legal, if that person is a combatant, or if the person is a civilian taking a direct part in hostilities. Moreover, according to the principle of proportionality, expected incidental loss of civilian life, injury to civilians or damage to civilian objects may be lawful (albeit regrettable) if they are not 'excessive' relative to the concrete and direct military advantage anticipated from the attack.[158] The Rome Statute

154 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 51(7), 57(b)(iii); The THIRD GENEVA CONVENTION, *supra* note 3, at Article 23; The FOURTH GENEVA CONVENTION, *Id.*, at Article 28; *Targeted Killing* case, *supra* note 26, at para. 36 of President Barak's judgment; HCJ 3799/02 *Adalah – Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, 60(3) 67 (2005), at paras. 20–25 of President Barak's judgment.

155 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 75(2); SECOND ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 14, at Article 4(2)(e); *Rome Statute*, *supra* note 61, at Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

156 HAGUE REGULATIONS, *supra* note 21, at Article 47; FOURTH GENEVA CONVENTION, *supra* note 3, at Articles 33, 147; *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 16, at Article 4(3).

157 See: FOURTH GENEVA CONVENTION, *supra* note 3, at Article 147; FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Articles 51(2) and 51(4).

158 This principle, which finds expression in the FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Articles 51(5)(b), 57(2). This principle has been recognized as reflecting customary law; See: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 41.

adopted a more lenient formula for the principle of proportionality that sets the threshold of criminality higher in that the International Criminal Court can only convict an accused for the war crime of disproportionate military force where the expected incidental injury or death of civilians or damage to civilian property is '*clearly excessive*' in relation to the concrete and direct overall military advantage.[159]

48. It is thus clear that not every case of death or injury of a person in an armed conflict amounts to a breach of the rules of international humanitarian law. The death or injury of combatants, civilians directly participating in hostilities, and collateral civilian casualties that are proportionate are permissible under international humanitarian law. The death of an individual is thus different from *prima facie* prohibited acts, such as the use of involuntary human shields or rape, which can never be justified as legitimate acts of warfare. The incidental death or injury of a civilian during an armed conflict, conversely, does not necessarily give rise to an automatic suspicion of criminality; it will be the context in which the incidental death or injury occurred that will determine whether there is a reasonable suspicion of the perpetration of a war crime. Any such reasonable suspicion will immediately trigger an investigation.

Fact–Finding Assessment

49. Some form of an examination is required when the level of suspicion does not meet the aforementioned threshold and the information is only partial or circumstantial, and there is a need to ascertain the circumstances of the event (in this Report this type of examination will be referred to as a 'fact–finding assessment').[160] A fact–finding assessment may lead to a

159 *Rome Statute*, *supra* note 61, at Article 8(2)(b)(iv). This stringent definition of 'proportionality' exemplifies the core difference between an offense under international criminal law and a violation of a customary norm of international humanitarian law. While a certain act might constitute a violation of Article 57(2) to the FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, theoretically, it still might not arise to the level of a 'war crime' that is subject to a criminal sanction.

160 See Benvenisti's criticism of the Military Advocate–General's opinion: 'The document does not

subsequent investigation if the assessment reveals a reasonable suspicion of the commission of a war crime. This type of assessment applies, *inter alia*, to exceptional or unexpected events and incidents such as civilian casualties that were not anticipated when the attack was planned that do not, *prima facie*, give rise to a reasonable suspicion of a war crime.

50. It should be emphasized that a commander may well wish to order that an examination or investigation be carried out because of a variety of other, non–legal considerations, including operational needs, a desire to learn from mistakes, or otherwise improve the performance of the unit in the future. For example, in some countries factual investigations are required as a matter of policy in any instance in which members of the country's armed forces kill a civilian.[161]

The Duty to Investigate in a Law Enforcement Context

51. Unlike the incidental death of an uninvolved civilian during combat operations, which does not immediately trigger a duty to investigate, the Commission is of the view that the killing of an individual (or the causing of serious injury) by security forces during law enforcement incidents, gives rise *in itself* to an investigatory obligation. In this context, the legitimate use of deadly force is limited to special circumstances, particularly to prevent a real and immediate life–threatening danger to oneself or another

provide an answer to the necessary question: what are the grounds for opening a "preliminary factual clarification!" Throughout the 100 pages of the detailed document, there is no answer to this key question' (*Benvenisti Opinion*, *supra* note 153, at 19); See also: *Shany & Cohen, Beyond the Grave Breaches*, *supra* note 82, at 17. Shany and Cohen advocate lowering the threshold to less than fully credible allegations or well–founded suspicions in potentially serious cases. Their rationale for this is that: 'Hence, allegations or suspicions pertaining to the most serious violations of law may require investigations even on the basis of less than fully credible allegations or well founded suspicions. A lowering of the threshold ... not only ensures a higher level of humanitarian protection, it also increases the prospects that less–serious violations would be effectively addressed. ... As a result, an incident featuring serious consequences in questionable circumstances, such as unexpected loss of life or wanton harm to property without a clear justification, may warrant an investigation even if no evidence of wrongdoing is initially available'.

161 See below, Chapter B, para. 81(4)(a) and in paras. 4, 32, 42–45, 50, 67–68.

person.[162] Causing death as a result of the use of force in a manner that exceeds the aforesaid restrictions will constitute an unlawful violation of the right to life.[163] In other words, in a law enforcement context, legitimate use of force is the exception, and the use of deadly force (shooting to kill) is the most narrowly prescribed exception.[164] Therefore, a law enforcement operation in which security forces cause the death or serious injury of an, individual automatically gives rise to a requirement to investigate.[165]

The Duty to Investigate Law Enforcement Activity in Armed Conflict

52. As noted in paragraph 14, law enforcement activity can occur during armed conflict, which raises the question of the applicability of the duty to investigate in such cases. According to the jurisprudence of the European Court of Human Rights, the obligation to investigate, which is derived from the right to life as it is enshrined in the European Convention for Human Rights, can extend to armed conflict situations.[166] The extent

162 See: The Commission's First Report, *supra* note 22, at para. 189.

163 See: *The International Covenant on Economic, Social and Cultural Rights*, *supra* note 30, at Article 6; *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 33, at Article 2; *The American Convention on Human Rights*, *Id.*, at Article 4; *The African Charter on Human and Peoples' Rights*, *Id.*, at Article 4.

164 See in particular: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, which determines that the use of deadly force by State representatives is generally permitted in three circumstances: (1) self–defense; (2) protection of others; and (3) law enforcement. The use of force in these circumstances is subject to additional basic principles, which are intended to ensure that the use of force would be essential and proportionate.

165 The duty to investigate such cases is expressed in various international documents and also in the jurisprudence of the human rights tribunals. See for example: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Articles 22–24; ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Articles 9–11; McKerr v. The United Kingdom, App. No. 28883/95, Eur.Ct. H.R. (2001) [hereinafter: *McKerr* case]: 'The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force'; See also: Juliet Chevalier–Watts, *Effective Investigations under Article 2 of the European Convention on Human rights*, 21(3) Eur. J. Int. L. 711–712 (2010) [hereinafter: *Chevalier–Watts, Effective Investigations*].

166 For a review of the European Court of Human Rights' interpretation of the question of the doctrine of 'dual applicability' of international human rights law in the context of armed conflict, see: Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, *in* International Humanitarian and Human Rights Law 201–203 (Ben–Naftali

to which the duty to investigate applies is determined by the nature of the operational activity. In several cases, the Court has interpreted and applied the obligations set forth in the Convention in the context of armed conflict, albeit in relation to policing activities rather than to combat operations or military hostilities. For instance, the Court recognized the need for exceptional measures in imposing public order and security in South–East Turkey, including resort to deadly armed force. According to the Court, such security demands do not, however, obviate the obligation to carry out an investigation whenever death ensues.[167] In *Issa and others v. Turkey*, the Court even extended the obligation to investigate, at least in principle, to military operations conducted beyond Turkish borders.[168] Similarly, in *Al–Skeini v. United Kingdom* (hereinafter: the *Al–Skeini* case), which concerned occupied Iraqi territory where intense hostilities were occurring, the Court ruled that the duty to investigate continues to apply even during an armed conflict (we shall return to this decision within the framework of the discussion of the law that applies in occupied territory).[169]

53. The Commission is of the view that where force must be used against uninvolved civilians during combat operations (as distinct from the use of force against military objectives that result in collateral damage), for instance, in forcefully clearing a residence of uninvolved civilians so that it may be used as a military position, the *lex generalis* of international human rights law will apply. This is so because these are usually acts of traditional law enforcement activities, even if they occur within the general context of an armed conflict. It follows that injury to an individual during operations of *this* kind may, *prima facie*, give rise to greater suspicion of criminality than collateral damage during a combat action, and in

ed., 2011).

167 See: *Kaya* case, *supra* note 108, at para. 91.

168 See: *Issa* case, *supra* note 42, at paras. 66–75.

169 See: Al–Skeini and Others v. United Kingdom, App. No. 55721/07, Grand Chamber Eur.Ct. H.R., paras. 163–165 (Jul. 7, 2011) [hereinafter: *Al–Skeini* case].

certain circumstances, will also require the immediate commencement of an investigation. The duty to investigate that arises from the killing or injuring of an individual during armed conflict depends therefore on a combination of the particular context and the facts relating to the specific incident which might determine whether it is legitimate or suspected.

54. **In summary, the Commission is satisfied that during an armed conflict there is a difference between the use of force in the context of the conduct of hostilities and the use of force in the context of law enforcement activities. Unlike the law enforcement context, the death or injury of a civilian during the conduct of hostilities does not automatically give rise to a duty to investigate.**[170] **However, a fact–finding assessment is required wherever there is a need to clarify the circumstances in order to establish whether there is a reasonable suspicion of an unlawful act (such as an attack resulting in significant unintended civilian casualties). This assessment may lead to a subsequent investigation. Conversely, where force causes any serious injury or death of an individual in the context of law enforcement activities there is a duty to investigate.**[171]

170 See: *MAG Position Paper 2010*, *supra* note 15, at 12–13; *Schmitt, Investigating Violations*, *supra* note 82, at 79; Dick Jackson, *Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War*, 11(6) THE ARMY LAWYER 95, 98 (2010).

171 See: *The International Covenant on Civil and Political Rights*, *supra* note 30, at Articles 2 and 6; *General Comment 31 of the Human Rights Committee*, *supra* note 42, at para. 15; *Rodríguez v. Honduras* case, *supra* note 108, at para. 170; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, para. 3(b) (Dec. 16, 2005), [hereinafter: UN Principles, Remedy for Victims of Violations 2005]; *Benvenisti Opinion*, *supra* note 153, at 28.

55. During an occupation, and especially during a prolonged occupation, the Occupying Power may be engaged in both law enforcement activities (such as maintaining public order) and combat operations relating to an armed conflict.[172]

56. Article 43 of the Hague Regulations, which has been called a 'mini–constitution for the occupation administration',[173] is of particular importance for periods of relative calm or for policing activities in general.[174] The Article determines the duty of the Occupying Power to impose public order and safety in the occupied territory:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[175]

Professor Yoram Dinstein explains the rationale behind the duty to ensure public order and safety:

> [T]he occupant cannot sit idly by if marauders pester the occupied

172 *B'Tselem* case, *supra* note 151, at paras. 7 and 11; *MAG Position Paper 2010*, *supra* note 15, at 10–12; *Shany, Cohen & Rosenzweig, Response Document to the MAG position paper*, *supra* note 125, at para. 22, where it is argued that the conflict should be viewed as a 'hybrid conflict'. See further: Michael N. Schmitt & Charles Garraway, *Occupation Policy in Iraq and International Law*, 9 INT'L PEACEKEEPING 27, 31 (2005) [hereinafter: *Schmitt & Garraway, Occupation Policy*]; *Watkin, Use of Force*, *supra* note 23, at 298–301.

173 BENVENISTI, BELLIGERENT OCCUPATION, *supra* note 22, at 69.

174 See: *Watkin, Maintaining Law and Order*, *supra* note 49, at 179; Rudiger Wolfrum, *The Adequacy of International Humanitarian Law Rules on Belligerent Occupation: To What Extent May Security Council Resolution 1483 Be Considered a Model for Adjustment*, *in* INTERNATIONAL LAW AND ARMED CONFLICT – EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN 497, 500–501 (Schmitt & Pejic eds., 2007).

175 THE HAGUE REGULATIONS, *supra* note 21, at Article 43; It should be noted that the French original contained the expression *la vie publique* ('civil life'), which was erroneously translated into English as 'safety'. See: BENVENISTI, BELLIGERENT OCCUPATION, *supra* note 22, at 10–11. The French expression strengthens even further the proposed reading, that the duty of the Occupying Power involves obligations that are derived from international human rights law.

> territory, killing the inhabitants, even though no soldiers of the army of occupation get injured. The occupant must maintain law and order, and he is not at liberty to tolerate the situation of lawlessness and disorder in the occupied territory.[176]

'Enforcement' activity takes place mainly on the ground, where the military forces carry out patrols, arrests and searches, man checkpoints and barriers, enforce curfews and disperse riots. From a legal viewpoint, such enforcement activity is akin to police actions within the State and therefore it is subject to human rights norms that permit the use of lethal force only in exceptional circumstances (see above in paragraph 51). Consequently, the death of the inhabitants of the occupied territory (as well as cases of serious injury) caused by the security forces of the Occupying Power is an exceptional event, which gives rise to a suspicion of an unlawful act, and therefore requires the immediate initiation of an investigation.[177]

57. In situations of armed hostilities in an occupied territory, the obligation to investigate is complex. In the *Al–Skeini* case, the European Court of Human Rights held that the activity of the British forces in Iraq during the period between May 2003 (the period when the coalition forces declared Iraq to be occupied territory) and June 2004 (when sovereign power was transferred to the transitional Iraqi Government) amounted to effective control and was therefore governed by the European Convention for Human Rights.[178] Thus, a duty to investigate arose with every case of an individual's death.

It should be noted that although the European Court of Human Rights cited the *Advisory Opinion regarding the Wall*, it did not address the specific content of the *lex specialis* principle and the entirety of its effect. The Court found that a State exercising effective control over foreign

176 See: Yoram Dinstein, *International Law of Belligerent Occupation and Human Rights*, 8 Isr. Y.B. Hum. Rts. 104, 111 (1978).

177 See: *MAG Position Paper 2010*, *supra* note 15, at 33–34.

178 See: *Al–Skeini* case, *supra* note 169.

territory has an obligation to secure the human rights of the individuals under its control. It held that in 'determining whether effective control exists, the Court will primarily have reference to the strength of the state's military presence in the area'.[179] Indeed, the rules of engagement that were given to the British forces in Iraq reflected a paradigm of law enforcement. However, by treating the situation in Iraq as one *fully* amenable to human rights, the Court seemed to ignore the very facts presented in its judgment, which reflected high levels of armed violence (more than 1000 violent incidents, including 145 mortar attacks, and 535 shooting incidents). The question of the intensity of hostilities or the nexus to the conflict and its effect on the applicable legal paradigm received no treatment in the decision. In this regard, it must be noted that the Court did emphasize that the United Kingdom was under the special obligations of the European Convention for Human Rights and that the Convention 'does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States'.[180]

58. The Commission's approach is that when hostilities break out during an occupation, the laws regulating the conduct of hostilities set forth in international humanitarian law apply. However, even during an armed conflict human rights norms apply to actions that can be broadly characterized as law enforcement activities, though 'separating the law enforcement role from the conduct of hostilities aspect of an insurgency is neither factually nor legally simple'.[181]

The Commission is satisfied that in occupied territory, and especially in a prolonged occupation, the default position is that the norms regulating the use of force are those of law enforcement.[182]

179 *Id.*, at para. 139.

180 *Id.*, at para. 141.

181 *Watkin, Use of Force*, *supra* note 23, at 294.

182 See: *Id.*, at 294-295 ('Consistent with traditional counterinsurgency doctrine, operational planning

Only if the activities necessitating the resort to lethal force qualify as 'direct participation in hostilities'[183] and are not mere internal disturbances and tensions, such as riots, isolated and sporadic acts of violence,[184] is the situation governed by the rules regulating the conduct of hostilities.[185] Obviously, classifying the nature of the activity must be circumstance–specific depending on the attendant facts.

59. **In summary, the death of an uninvolved civilian during hostilities that amount to an armed conflict (whether in an occupied territory or not) does not in itself give rise to an immediate duty to investigate, except in a case where a 'reasonable suspicion' arises, or a 'credible allegation' is made, that a war crime was committed. When the level of suspicion or the credibility of an allegation of a war crime has not been met and the information received is only partial or circumstantial, a fact–finding assessment must be conducted in order to clarify whether there is a need to investigate**.

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should rely on the "police primacy principle"... [However] it is also evident that the nature and scale of the threat posed by ongoing hostilities, as well as the organization, training, traditional role and equipment of police forces, means that they are not the only security forces engaged either in law enforcement or in countering the insurgency during an occupation. Military forces of the Occupying Power will be required to participate in hostilities; fill gaps in the policing capacity; and provide support to police operations'). See, also: RENE PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 349–350 (2002) ('While there is indeed space for enlightened cross–pollination and better integration of human rights and humanitarian law, each performs a task for which it is better suited than the other, and the fundamentals of each system remain partly incompatible with that of the other').

183 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 51(3).

184 See: COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTION OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON–INTERNATIONAL ARMED CONFLICTS, Article 1, para. 4474 (Sandoz et al. eds., 1987), *Rome Statute*, *supra* note 61, at Article 8(2)(d).

185 See: *Schmitt & Garraway, Occupation Policy*, *supra* note 172, at 31: 'Despite the existence of an occupation, humanitarian law related to the conduct of hostilities continues to govern actions with a direct nexus to the conflict. ... on the other hand, actions with no direct nexus to the hostilities are subject to human rights law, law imposed by the occupier, and any domestic penal law remaining in force'. For a definition of the term 'nexus' in the context of armed conflict, see: *Prosecutor v. Gotovina*, ICTY Case No. IT–06–90–T, T. Ch., para. 1677 (Apr. 15, 2011) ('The alleged crime need not have occurred at a time and place in which there was actual combat, so long as the acts of the perpetrator were "closely related" to hostilities occurring in territories controlled by parties to the conflict. The existence of this close relationship between the crime and the armed conflict will be established where it can be shown that the conflict played a substantial part in the perpetrator's ability to commit the crime, his or her decision to commit it, the manner in which it was committed, or the purpose for which it was committed'). See also: *Watkin, Use of Force*, *supra* note 23, at 310–311.

Such clarification is particularly important where an exceptional incident has occurred pointing to facts or circumstances that might subsequently reveal the need for an investigation. The existence of a reasonable suspicion that a war crime has been committed is dependent both on the facts of the incident, and the legal context. Where the context indicates that the situation should be governed by the norms of law enforcement, the death of an individual (or serious injury) by security forces gives rise to an immediate duty to investigate as aforesaid, because of the *prima facie* suspicion of criminality inherent in such a situation.

E. Method of Conducting an Examination and an Investigation ('How to Investigate?')

60. In determining the manner in which inquiries should be conducted we will distinguish between the general duty to examine every violation of the rules of international humanitarian law and the specific duty to conduct an investigation where a reasonable suspicion of the commission of a war crime has been met.

Examination

61. Not every violation of the rules of international humanitarian law entails criminal liability, and certain situations call for disciplinary or other sanctions which only the commander is able to impose. International humanitarian law attaches supreme importance to the obligation to comply with its rules i.e., to 'suppress all other breaches'.[186] As noted above, the duty to 'examine' is consistent with the obligation to 'suppress'. The duty to suppress may be carried out through reporting duties, disciplinary measures and other actions and activities that facilitate compliance. **Therefore, an examination of events must be conducted in a fashion that guarantees the suppression of violations and ensures future compliance with international humanitarian law**.[187]

Investigation

62. The obligation to 'repress' requires the investigation of alleged serious violations of international humanitarian law. The jurisprudence of the international courts and tribunals has considered the meaning of

186 See: First Additional Protocol to the Geneva Conventions, *supra* note 13, at Article 86.

187 See: The Commentary on the Protocol Additional to the Geneva Convention, *supra* note 56, at paras. 3559–3562; See also: Commentary on the IV Geneva Convention, *supra* note 22, Article 146, at 594.

the duty to investigate in the context of the obligation on commanders and other superiors to hold their subordinates accountable. In *The Prosecutor v. Jean–Pierre Bemba Gombo* Confirmation of Charges decision, the Pre–Trial Chamber of the International Criminal Court stated that the duty to 'repress' breaches of international humanitarian law includes, in practice, two separate duties, which should be discharged at different points in time. One is the duty to stop the occurrence of crimes, and the other is the duty to punish those responsible for committing crimes. The Court stated that the duty to punish could be fulfilled in one of two ways:

> [E]ither by the superior himself taking the necessary and reasonable measures to punish his forces, or, if he does not have the ability to do so, by referring the matter to the competent authorities.[188]

In its analysis of the duty imposed on superiors to punish their subordinates for the commission of war crimes, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor v. Sefer Halilović* held that:

> The *duty to punish* includes at least an obligation to *investigate* possible crimes or have the matter investigated, to *establish the facts*, and if the superior has no power to *sanction*, to *report* them to the competent authorities.
>
> Military tribunals established after World War II interpreted the superiors' duty to punish as implying an obligation for the superior to *conduct an effective investigation* and to take active steps to ensure that the perpetrator will be brought to justice. Whether the superior has called for a report on the incident and the thoroughness of the investigation could also be relevant in this respect.[189]

188 *Bemba* case, *supra* note 90, at para. 440.

189 See: *Halilović* case, *supra* note 90, at paras. 97–98 [emphases added]; See also: *Boškoski and Tarčulovski* case, *Id.*, at para. 418.

Thus, it can be interpreted from the case law that an 'effective investigation' is one that is capable of identifying those responsible and committing them to justice. In most cases an investigation will be criminal but it can also take other forms.[190] We shall now turn to analyze the accepted general principles for holding an 'effective investigation'.

The Requirements for Conducting an 'Effective Investigation'

63. International humanitarian law provides sparse details on the practical content of investigations,[191] but more systematic and comprehensive guidance can be found in international human rights instruments.[192] Four 'general principles' have been identified as applying to investigations: independence, impartiality, effectiveness and thoroughness, and promptness (hereinafter: the general principles). The adherence to these four principles forms an 'effective investigation'.[193] The Commission is of the view that international human rights law further articulates transparency as a fifth principle (its application under international humanitarian law

190 Debate has arisen in the literature concerning the most suitable form for an investigation under international humanitarian law. Shany and Cohen argue against an exclusive focus on criminal investigations and question whether it is the most effective technique available. They offer the example of commissions of inquiry as a useful non–criminal response to alleged violations of international humanitarian law. See *Shany & Cohen, Beyond the Grave Breaches*, *supra* note 82, at 37–39.

191 On the standards relevant for legal proceedings in general see: First Additional Protocol to the Geneva Conventions, *supra* note 13, at Article 75(4); Second Additional Protocol to the Geneva Conventions, *supra* note 14, at Article 6(2); On the duty to put those accused of war crimes on trial promptly and without bias, see: Commentary on the IV Geneva Convention, *supra* note 22, Article 146 at 593; On the duty to carry out an effective investigation on cases of the death of prisoners of war, see: Commentary on the III Geneva Convention of 12 August 1949 Relative to the Treatment of Prisoners of War, Article 121, 570 (Pictet ed., 1958) [hereinafter: Commentary on the III Geneva Convention]; UN Principles, Remedy for Victims of Violations 2005, *supra* note 169, at para. 3(b).

192 See: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22; ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Articles 9–17; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/RES/55/89 (Feb. 22, 2001) [hereinafter: UN Principles, Effective Investigation of Torture 2001].

193 A distinction should be made between two uses of the term 'effective' when describing investigations. The first use of the term is 'effective' in the broad sense, which relates to the overall requirement of conducting an 'effective investigation' according to the obligation under international law. An 'effective investigation' must comply with the principles for carrying out an investigation. The second use of the term is 'effective' in the narrow sense, which constitutes one of the principles for carrying out an investigation. More specifically, this principle (which includes effectiveness and thoroughness) is concerned with the means of the investigation in order to discover the truth.

will be discussed below in paragraphs 106–107). It should be emphasized that from the moment a duty to carry out an 'effective investigation' arises, there is no *fundamental* difference, nor should there be, between the principles for conducting an 'effective investigation' in a situation of an armed conflict and the principles for conducting an 'effective investigation' in a situation of law enforcement.[194] An important qualification of this position is that the Commission considers the practical implementation of the principles to be contextual,[195] and therefore the precise content may vary under the international humanitarian law and international human rights law regimes. The final part of the chapter will explore how the general principles translate in situations of armed conflict.

64. The general principles for an 'effective investigation' can be found in various international human rights law sources, including binding conventions (such as the Convention against Torture);[196] interpretations of the International Covenant on Civil and Political Rights by the Human

194 See also: Human Rights Council, Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 254/64 including the independence, effectiveness, genuineness of these investigations and their conformity with international standards, U.N. Doc. A/HRC/15/50, para. 30 (2010) [hereinafter: *Tomuschat Report*]: 'The Committee believes that the gap between the expansive standards under IHRL and the less defined standards for investigations under IHL is not so significant. Several criteria under human rights law can be met within the context of armed conflict. Above all, investigators must be impartial, thorough, effective and prompt; otherwise, an investigation would be no more than a manoeuvre of artful deceit. Any investigations that meet these criteria may be called credible and genuine'.

195 *Schmitt, Investigating Violations*, *supra* note 82, at 55; See also: *Blaškić* case, *supra* note 90, at para. 417, were the Court notes that the means that the commander must use depends on the circumstances of each case.

196 See: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 32, at Article 12, which sets forth that where there is a reasonable suspicion that acts of torture have been committed in the territory of a State, that State is required to ensure that its competent authorities shall investigate the suspicions with due speed and absent of all bias. It should be noted that in the past few years, the Committee Against Torture has adopted in its decisions, in concrete cases that were brought before it, the demand for transparency in investigations (See for instance: Danilo Dimitrijevic v. Serbia and Montenegro, Comm. No. 172/2000, U.N. Doc. CAT/C/35/D/172/2000, para 7.3 (2005) [hereinafter: *Dimitrijevic* case]).

Rights Committee[197] and its decisions in specific cases;[198] and resolutions adopted by the General Assembly of the United Nations.[199] Other institutions that deal with this issue extensively include the European Court of Human Rights and the Inter–American Court of Human Rights.[200] While the decisions of many of these bodies are not universally binding, they help clarify the meaning of each of the general principles for an 'effective investigation'.

65. Before considering the practical content of each of the general principles, first in general and then in the context of armed conflict, two preliminary comments are warranted: *first*, some of the sources in the field of international human rights law indicate that there are different types of effective investigations. Criminal investigations are one, but other types may also suffice, as long as they conform to the general principles, thereby constituting an 'effective investigation'.[201] An 'effective

197 See for example: The Human Rights Committee's General Interpretation of *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 6, which incorporates the right to life, in which it is noted that in circumstances in which there is a suspicion of a violation of the right to life the investigation of 'disappeared' or missing people must be thorough and effective; Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 6, para. 4 (1994) [hereinafter: *General Comment 6 of the Human Rights Committee*]. See: *General Comment 31 of the Human Rights Committee*, *supra* note 42, at para. 15, which deals with the nature of the general duty placed on member States of the Covenant of Civil Rights, that the investigation of violations of the Covenant shall be independent, comprehensive, effective, and shall be conducted promptly.

198 See for example: Baboeram–Adhin v. Suriname, HRC, Comm. No. 146/83 & 148–154/83, U.N. Doc. CCPR/C/24/D/154/1983, A/40/40, at 187, para. 16 (1985); Herrera Rubio v. Colombia, HRC, Comm. No. 161/83, U.N. Doc. CCPR/C/31/D/161/1983, A/43/40, at 190, para. 10.3 (1987); Arévalo Pérez v. Colombia, HRC, Comm. No. 181/84, U.N. Doc. CCPR/C/37/D/181/1984, A/45/40, at 31, para. 10 (1989); Mojica v. Dominican Republic, HRC, Comm. No. 449/91, U.N. Doc. CCPR/C/51/D/449/1991, A/49/40 Vol II, at 142, para. 5.5 (1994) [hereinafter: *Mojica* case]; Laureano Atachahua v. Peru, HRC, Comm No. 540/93, U.N. Doc. CCPR/C/56/D/540/1993, A/51/40 Vol II, at 108, Para. 8.3 (1996).

199 See in particular: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22; ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109; UN Principles, Effective Investigation of Torture 2001, *supra* note 192.

200 See: *Rodríguez v. Honduras* case, *supra* note 108, at para. 177; Humberto Sánchez v. Honduras, Inter–Am.Ct.H.R., (Ser. C), No.99. para. 139 (Jun. 7, 2003) [hereinafter: *Sánchez* case]; Myrna Mack Chang v. Guatemala, Inter–Am.Ct.H.R, (Ser. C), No.101, para. 156 (Nov. 25, 2003); See also the rulings of the European Court of Human Rights: *McCann* case, *supra* note 42, at para. 161; *Al–Skeini* case, *supra* note 169, at para. 163.

201 For example, on the matter of investigating the use of force by law enforcement authorities, see: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22, where it is set forth that: 'Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11(f). For incidents reported pursuant to

investigation' is demonstrated, *inter alia*, by the capacity to properly decide the question of responsibility for an act, and, in appropriate cases, to hold perpetrators accountable. The European Court of Human Rights characterized the obligation to investigate arising from the death of a civilian from the use of force by State agents as a duty to hold 'some form of effective official investigation',[202] and it went on to state that '[w]hat form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances'.[203] Similarly, a report prepared by the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions states that although as a rule, compliance with the duty of holding an investigation should be assured by the criminal law system, in certain cases it is possible that the ordinary systems will not be capable of doing justice (such as widespread killing or cases that are politically charged), and other methods should be employed, including the establishment of public commissions of inquiry.[204] It appears from these sources that an

these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control'.

202 See: *McCann* case, *supra* note 42, at para. 161; *Al–Skeini* case, *supra* note 169, at para. 163; See also: Oğur v. Turkey, App. No. 21594/93, Eur.Ct. H.R., paras. 88, 90–93 (1999) [hereinafter: *Oğur* case]. In these cases, the European Court of Human Rights applied the standard of 'effective investigation' to non–criminal investigations, for example, to commissions of inquiry and administrative investigations. This indicates that, at least in principle, the fact that the investigation being carried out is not of a criminal nature does not automatically make it 'ineffective', but it should nonetheless comply with certain standards.

203 See: *Al–Skeini* case, *supra* note 169, at para. 165; A similar sentiment was expressed by the Court in the following cases: Ahmet Özkan and Others v. Turkey, App. No. 21689/93, Eur.Ct. H.R., para. 310 (Apr. 6, 2004) [hereinafter: *Özkan* case]; İpek v. Turkey, App. No. 25760/94, Eur.Ct. H.R., para. 169 (Feb. 17, 2004). The language of these rulings show that the Court understands the term 'accountability' as referring to an examination that is open to public scrutiny and not necessarily a criminal investigation.

Comparison, however, can be made to the position of the Inter–American Court of Human Rights, which emphasizes the importance of a criminal investigation in cases of alleged violations of the right to life; See: *Molina* case, *supra* note 52, where the Court notes that: 'In those cases alleging the arbitrary deprivation of life, the adequate remedy is the criminal investigation and trial initiated and pursued ex oficio by the State to identify and punish the perpetrators'. Compare also the position of the UN Report: Juan E. Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/19/61, p.69–70 (2012): 'By itself, a commission of inquiry is never sufficient to fully satisfy a State's obligations under international law with regard to torture and other forms of ill–treatment... Commissions of inquiry should therefore be considered complementary to other mechanisms, including criminal investigations and prosecution of perpetrators, the provision of reparations to victims, and extensive reforms to institutions, including the vetting of public officials'.

204 See: Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary

investigation does not necessarily need to be a criminal investigation in order to be an 'effective investigation'. Thus, for example, when facing situations that may not be properly addressed by criminal investigation, due to their nature, complexity, or scope, it is appropriate to use additional or complementary tools.[205]

66. *Second*, it is important to address the confusion with regard to the question of how the general principles relate to different institutions i.e., to judges, prosecutors, police, defense counsel, etc. Often the discussion takes place on the premise that each of the principles should be interpreted and applied uniformly to all the different officials and institutions. However, it is likely that the principles should be interpreted and applied differently, taking into account the specific functions of the official or institution.

The General Principles

1. Independence

67. It is well established that an 'effective investigation' must be conducted independently; however, as noted, what independence means depends upon the body, the institution, or the official by whom it is conducted. In the analysis of the case law below, it is demonstrated that prosecutors, police and defense counsel are each required to meet different degrees of independence.

68. The Geneva Conventions and the Additional Protocols offer little guidance on the precise substance of an independent investigation, though Article 84 of the Third Geneva Convention refers to the principle of

Executions: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, A/HRC/8/3, paras. 14, 22–23 (2008) [hereinafter: *The Alston Report 2008*].

205 See: *Al–Skeini* case, *supra* note 169, at paras. 174 and 176; See also, for example: Report of the *Bloody Sunday Inquiry* (HC29–I, House of Commons, 2010) (the Committee investigated an incident that took place on Jan. 30, 1972, in Northern Ireland during which thirteen people were killed by gunfire from British soldiers during a civil rights demonstration in Northern Ireland).

'independence and impartiality' as that which is 'generally recognized'.[206] Due to the paucity of guidance in international humanitarian law, consideration of international human rights law and international criminal law can be helpful.

69. One area of the investigative process where this principle becomes important is the independence of the prosecutor. The United Nations Guidelines on the Role of Prosecutors articulate several standards that are intended, *inter alia*, to ensure the independence of the prosecution in carrying out its functions, including the regulation of status, terms of employment and promotion of prosecutors.[207] From an institutional viewpoint, the rules provide that the office of prosecutors shall be strictly separate from judicial functions.[208] Nonetheless, the Guidelines do not contain a similar requirement with regard to investigative authorities, and it is even provided that where law or local practice permit, the prosecutors shall take an active role in the investigation of crimes and supervision over the legality of the investigations.[209] In this context, it should be stated that various countries have adopted different institutional models on the question of the relationship between the prosecution and investigation authorities, ranging from complete separation to combining the two

206 See: The THIRD GENEVA CONVENTION, *supra* note 3, at Article 84.

207 See: United Nations, Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, *available at:* www2.ohchr.org/english/law/prosecutors.htm [hereinafter: UN Guidelines, Role of Prosecutors 1990]. Thus, for example, in the section dealing with the status and terms of employment of prosecutors, it is provided in Article 4 that States should ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil or criminal liability; Article 5 provides that the physical safety of prosecutors and their families should be guaranteed against threats that result from their performing their jobs as prosecutors; Article 6 further provides that the State should regulate in law or public regulations prosecutors' conditions of service, including salary, pension, promotion rules, retirement agreement, etc.; Article 7 provides that the promotion of prosecutors will be effected on the basis of objective criteria, which relate mainly to professional aspects, such as qualifications, ability, integrity, experience, and that it will be done by means of a fair and impartial procedure; Articles 8–9 further provide that prosecutors are entitled to benefit from freedom of expression and incorporation, subject to the obligations and status that derive from their jobs.

208 *Id.*, at Article 10.

209 *Id.*, at Article 11.

authorities into one body.[210] Notwithstanding the diversity of the practice, it would appear, as a rule, that none of these models necessarily conflicts with the aforesaid UN Guidelines. On the contrary, several decisions of the European Union specifically emphasize the importance of cooperation between the prosecution and the police, and the need to ensure 'appropriate and functional' cooperation in countries where there is a complete institutional separation between these two authorities.[211]

70. The Office of the Prosecutor of the International Criminal Court has also expressed the need for independence in carrying out its function. It has interpreted independence under the Rome Statute to mean acting independently of instructions from any external source. The Office of the Prosecutor articulated that 'independence goes beyond not seeking or acting on instructions: it means that the Office decisions shall not be altered by the presumed or known wishes of any party or by the cooperation seeking process'.[212] The Office of the Prosecutor has also specified criteria by which to evaluate the independence of national proceedings:

> [I]ndependence in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, the alleged involvement of the apparatus of the State, including those responsible for law and order, in the commission of the alleged crimes; the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators; political interference in the investigation; and the corruption of investigators, prosecutors and judges.[213]

210 See: European Commission for Democracy through Law (Venice Commission): Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service, cdl–ad(2010)040, para. 8 (2010), *available at:* www.venice.coe.int/docs/2010/cdl–ad(2010)040–e.pdf.

211 See: The Role of Public Prosecution in the Criminal Justice System: Recommendation Rec(2000)19, Article 23 (2000), *available at:* https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM.

212 See: Draft Policy Paper on Preliminary Examinations, ICC Office of the Prosecutor, Para. 34 (Oct. 14, 2010), available *at:* www.icc–cpi.int/NR/rdonlyres/E278F5A2–A4F9–43D7–83D2–6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf [hereinafter: *Draft Policy Paper on Preliminary Examinations*].

213 *Id.*, at para. 64.

71. The European Court of Human Rights has comprehensively addressed the importance of the principle of independence in conducting an investigation. According to the approach of the Court, the persons responsible for investigating an incident should be independent from persons implicated in the incidents, especially when those persons implicated belong to State agencies or bodies, such as the police. In *McKerr v. United Kingdom* (hereinafter: the *McKerr* case), the Court expressed the need for hierarchical and institutional independence:

> For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events… *This means not only that there should be no hierarchical or institutional connection but also clear independence*...[214]

Another example where the Court found the investigation authorities to lack independence was in *Ramsahai v. The Netherlands* (hereinafter: the *Ramsahai* case). The investigation of Dutch police officers was conducted by colleagues from their own district rather than by the State Criminal Investigation Department. The Court ruled that supervision by the suspects' own authority, no matter how independent, is an insufficient safeguard for ensuring the 'independence of the investigation'.[215] The Court emphasized the importance of independence both in practice and in law,[216] and reiterated again the Court's formula that:

> [F]or the investigation to be "effective" in this sense it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated

214 See: *McKerr* case, *supra* note 165, at para. 112 [emphasis added].

215 See: Ramsahai v. The Netherlands, App. No. 52391/99, Eur.Ct. H.R., paras. 294–296, 337 (2005) [hereinafter: *Ramsahai* case].

216 *Id.*, at para. 112.

> in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.[217]

The Court's emphasis on practical and institutional independence was developed in *Kolevi v. Bulgaria* (hereinafter: the *Kolevi* case) where the Chief Public Prosecutor was allegedly implicated in the incident under consideration. The Court was prepared to recognize various models that will satisfy the requirement of institutional independence, as demonstrated by the judgment's survey of different countries' practice.[218] It held that:

> Independence and impartiality in cases involving high–ranking prosecutors or other officials may be secured by different means, such as investigation and prosecution by a separate body outside the prosecution system, special guarantees for independent decision–making despite hierarchical dependence, public scrutiny, judicial control or other measures. It is not the Court's task to determine which system best meets the requirements of the Convention. The system chosen by the member State concerned must however guarantee, in law and in practice, the investigation's independence and objectivity in all circumstances and regardless of whether those involved are public figures.[219]

Moreover, the Court in the *Kolevi* case emphasized that independence is a fundamental component of an 'effective investigation' in its finding that, although the investigators performed many of the aspects of the investigation competently (for example, analyzing physical evidence and questioning bystanders), the fact that the investigation was under the control of the Chief Prosecutor (i.e., the very person the victim and his family accused) 'undermined decisively its effectiveness'.[220]

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217 *Id.*, at para. 325; See also: *Al–Skeini* case, *supra* note 169, at paras. 167 and 172, where the Court emphasized the term 'operationally independent'.

218 See: Kolevi v. Bulgaria, App. No. 1108/02, Eur.Ct. H.R., paras. 138–152 (Nov. 5, 2009) [hereinafter: *Kolevi* case]; The States surveyed were Croatia, Cyprus, Estonia, France, Germany, Greece, Ireland, Italy, Malta, Russia, Spain, Sweden, Switzerland, Macedonia and the United Kingdom.

219 *Id.*, at para. 208..

220 *Id.*, at paras. 211–212.

72. In addition to the rich jurisprudence of the European Court of Human Rights on the obligation to conduct an investigation independently, it should also be noted that the 2008 report of the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions points out three aspects of the independence requirement (formal, practical and personal) in the context of outlining the basic conditions of a public commission of inquiry:

> First, independence must be structurally guaranteed so that the commission is set up as a separate institution from the Government. This formal independence can often be assessed by examining the terms of the mandate before the commission begins its work, or through an examination of the early investigatory practices of the commission. … Second, where formal independence has been established, actual independence may still be lacking. It is essential to look beyond the formal independence of the commission from the Government, and to assess whether the commission is capable in practice of carrying out its work independently. This may require the work of the commission to be monitored for the entire period of its operation. ... Third, a commission's members must also be judged to be individually independent and not be seen to have a vested interest in the outcome.[221]

73. Before we turn to consider the other general principles, an important preliminary question must be addressed: can a military justice system, as such, be sufficiently independent to undertake an 'effective investigation'? The Commission emphatically answers this question affirmatively. Not only are internal investigations by military actors permitted under international humanitarian law, but those precise structures are expressly envisaged.[222] For example, Article 84 of the Third Geneva Convention

221 See: *The Alston Report 2008*, *supra* note 204, at paras. 25, 33–38.

222 See: The FOURTH GENEVA CONVENTION, *supra* note 3, at Article 146; FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 87(3); For an in–depth discussion on the issue, see: *Schmitt, Investigating Violations*, *supra* note 82, at 80, para. 10; See also; *Id.*, at 81, para. 15: 'There is no obligation to conduct investigations outside military channels into possible IHL violations'.

It should be noted that international criminal law, as reflected in the *Rome Statute*, does not regard a military justice system, as such, to be unsuitable for an appropriate legal procedure. Therefore,

refers to the military justice system of States Parties as the default system in which both the State's own military personnel as well as prisoners of war should be brought to trial.[223]

A similar attitude has been expressed in *Cooper v. the United Kingdom*, where the European Court of Human Rights held that the existence of a service tribunal is not necessarily inconsistent with the principle of independence. It found that 'there is no reason to doubt the independence of the decision–making of those bodies from chain–of–command, rank or other service influence'.[224]

As will be demonstrated in Chapter B of this Report, and in the country reports (Annex C), the four common law countries that were surveyed by the Commission have distinct systems of military justice, all supporting the proposition that the mere existence of such a system is not, *ipso facto*, inconsistent with the accepted rules of international law.[225]

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there is no inherent reason why a military justice system should not comply with the threshold of 'complementarity' that is enshrined in the *Rome Statute*, *supra* note 61, at Article 17. According to the Commentary on the Statute, when addressing the question of whether a State is 'shielding' a suspect according to the meaning of Article 17, the court might address various indications: 'for example, bypassing the normal criminal (*either civil or military*) procedures by appointing a special investigator who is politically aligned with persons close to the accused could also be a determining factor' [Emphasis added]; THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 675 (Cassese, Antonio, Gaeta & Jones eds., 2002).

See also: KLEFFNER, COMPLEMENTARITY, *supra* note 120, at 148, who notes that: 'If a State decided to establish military or special courts for the purpose of trying core crimes, the applicable criteria for the ICC to determine whether proceedings "were not or are not conducted independently or impartially" remain the same as for ordinary courts'.

223 See: The THIRD GENEVA CONVENTION, *supra* note 3, at Article 84, which compares prisoner of war status with the status of the soldiers of the Detaining Power, when they are brought to criminal trial (as distinct from disciplinary proceedings): 'A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war'.

224 See: Cooper v. The United Kingdom, App. No. 48843/99, Eur.Ct. H.R., para. 115 (Dec. 16, 2003) [hereinafter: *Cooper* case]; See also: Grieves v. The United Kingdom, App. No. 57067/00, Eur.Ct. H.R., para. 69 (Dec. 16, 2003); Findlay v. The United Kingdom, App. No. 110/1995/616/706, Eur.Ct. H.R., para. 73 (Feb. 25, 1997).

225 Notwithstanding, in the majority of military justice systems surveyed in Chapter B, the Commission indentified a move towards varying levels of civilian involvement and oversight. This trend seems to have been influenced by the principle of independence.

The Commission concludes that, consistent with the Geneva Conventions and their Commentaries, decisions by tribunals, and State practice, a military justice system is not necessarily inconsistent with the principle of independence.

74. In summary, in order to achieve an 'effective investigation' it must be conducted independently. The principle of independence consists of both institutional independence (for example, the prosecution is separate from the judiciary) and practical independence (for example, the investigators are in no way connected to the incident under consideration).

2. Impartiality

75. The principle of impartiality is intended to ensure that an investigation is conducted objectively and in an unbiased fashion. It includes a personal requirement, such as the absence of an interest in the results of a specific investigation or proceeding, and an objective opinion towards the parties to the case. Additionally, the principle is often extended to include a requirement for a perception of impartiality.[226] As noted, Article 84 of the Third Geneva Convention refers to the principle of 'independence and impartiality' as that which is 'generally recognized'.[227] While there is significant overlap between the principles of 'independence' and 'impartiality' ('practical independence' and impartiality can both involve a personal aspect) they are not synonymous. As distinct from the principle of independence, impartiality focuses on the function of the investigator, including the perception of his or her function. Thus, for example, it is clear that a judge, who in general enjoys institutional and functional independence, can be tainted by partiality in relation to one of the litigants before him or her. Due to the lack of detail in international humanitarian law on the meaning of the principle of impartiality, here too

226 See: Girgvliani v. Georgia, App. No. 25091/07, Eur.Ct. H.R, para. 147 (Apr. 26, 2011) [hereinafter: *Girgvliani* case].

227 See: The THIRD GENEVA CONVENTION, *supra* note 3, at Article 84.

consideration of international human rights law and international criminal law can be helpful.

76. The practical content of the principle of impartiality requires impartiality on the part of the investigative authorities as well as the evidence relied on in conducting the investigation.[228] Thus, for example, the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, demands not only that the investigators be impartial but also that the evidence (including witnesses) upon which they rely on is impartial.[229]

77. The European Court of Human Rights has also expressed the need for investigations to be conducted impartially. In the *Kolevi* case, the Court held that the 'involvement [in the investigation] of persons against whom the victim and his relatives had made serious complaints based on specific facts is incompatible with the principle... of impartiality'.[230] In *Girgvliani v. Georgia* the Court criticized the investigation into a high–profile murder case and found that the authorities 'were lacking in candour in the conduct of the investigation' and that the investigation 'manifestly lacked' impartiality.[231] The shortcomings were present at all levels of the investigation, including the selective approach to evidence by the Interior

228 See: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra* note 32, at Article 12; *General Comment 31 of the Human Rights Committee, supra* note 42, at para. 15; See also: UN Principles, Effective Investigation of Torture 2001, *supra* note 192, at Article 5(a): 'In cases in which the established investigative procedures are inadequate because of insufficient expertise or *suspected bias*, or because of the apparent existence of a pattern of abuse or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. *Members of such a commission shall be chosen for their recognized impartiality*, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles' [emphases added].

229 See: UN Principles, Effective Investigation of Torture 2001, *supra* note 192, at Article 2: 'The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts'.

230 See: *Kolevi* case, *supra* note 218, at para. 211.

231 See: *Girgvliani* case, *supra* note 226, at para. 276.

Ministry and then by the prosecutor's office, and the unreasonable leniency towards the accused both during their detention and trial.

78. In the framework of international criminal law, the Draft Policy Paper on Preliminary Examination by the Office of the Prosecutor is useful in understanding this principle. It provides examples of partiality:

> Impartiality in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, linkages between the suspected perpetrators and competent authorities responsible for investigation, prosecution and/or adjudication of the crimes; public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.[232]

It should be noted that these 'indicators' further demonstrate the overlap between practical independence and impartiality.

79. In summary, the analysis of the principle of impartiality demonstrates the way the investigator's personal bias or conflict of interest hinders an 'effective investigation'.

3. Effectiveness and Thoroughness

80. Effectiveness and thoroughness are part of the basic principles that relates to the realization of the purpose of the investigation, i.e., arriving at the truth. It requires that an investigation be conducted professionally. The Commentary on Article 121 of the Third Geneva Convention regarding the requisite investigation when a prisoner of war dies in the custody of a State asserts that '[t]he victim must therefore be thoroughly examined,

232 See: *Draft Policy Paper on Preliminary Examinations*, *supra* note 212, at para. 65.

if necessary by an expert in forensic medicine, and all witnesses must be heard as well as the person who made the attack, if any'.[233]

81. International human rights sources provide substantial detail in explaining the principle of effectiveness and thoroughness. It has been generally interpreted by various human rights bodies and documents to relate to the procedures and mechanisms involved in carrying out an investigation.[234] These interpretations are helpful in understanding the principle by providing concrete examples of such mechanisms. A 'thorough investigation', according to Article 9 of the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, should include 'an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses'.[235] The way an investigation is conducted and the quality of the evidence relied upon are also essential for achieving an effective and thorough investigation. The UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions expressed the importance of conducting an investigation in a competent fashion and stated that professionalism allows a thorough consideration of the subject of the investigation.[236]

An example of the way a failure to adequately conduct an investigation undermined its effectiveness can be seen in a case before the Committee Against Torture. The Committee considered that an investigation conducted by a particular State Party's authorities was *neither effective nor thorough* due to apparent inconsistencies in evidence, inadequacies in the forensic examination, and unsuitable expert witnesses. The Committee found that

233 See: COMMENTARY ON THE III GENEVA CONVENTION, *supra* note 191, at 570.

234 See: *General Comment 6 of the Human Rights Committee*, *supra* note 197, at para. 4; See also, for example: *Mojica* case, *supra* note 198, at para. 5.2, where the Committee noted that a State is obligated to investigate claims and suspicions of a violation of the provisions of the Convention, *inter alia*, thoroughly: 'It is implicit in Article 4, paragraph 2, of the Optional Protocol and in rule 91 of the rules of procedure that a *State Party investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it*...' [emphasis added].

235 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 9.

236 See: *The Alston Report 2008*, *supra* note 204, at para. 32.

such inconsistencies must be rectified in order to establish 'a satisfactory degree of certainty' in the evidence relied upon in an investigation.[237]

82. The approach adopted by the European Court of Human Rights is that the effectiveness of an investigation is not measured by its results, i.e., by finding one of the parties involved to be guilty, but it is a question of 'means'.[238] The rulings of the Court suggest general guidelines for achieving an effective and thorough investigation, including: an autopsy and necessary medical tests take place; all of the relevant evidence is collected and documented; all of the relevant witnesses are identified and interviewed thoroughly and statements are taken from them; and the process of reaching conclusions is based on a thorough analysis of all of the relevant material.[239] Importantly, the Court has avoided being prescriptive about the specific details of the procedures that are necessary to ensure effectiveness. In the *McKerr* case the Court found that as long as the purpose, i.e., the holding of an effective investigation, is achieved, it did not purport to stipulate the proper procedures that States should adopt:

> It is not for this court to specify in any detail which procedures the

237 See: Radivoje Ristić v. Yugoslavia, HRC, Comm. No. 113/98, U.N. Doc. CAT/C/26/D/113/1998, paras. 9.4–9.6 (2001).

238 See: Avşar v. Turkey, App. No. 25657/94, Eur.Ct. H.R, para. 394 (2001) [hereinafter: *Avşar* case], where the Court noted, *inter alia*, that: 'This is not an obligation of result, but of means'; See also: Brecknell v. United Kingdom, App. No. 32457/04, Eur.Ct. H.R, para. 66 (2007) [hereinafter: *Brecknell* case], where the Court noted that: 'The fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such. The obligation is of means only'.

239 See: *Avşar* case, *supra* note 238, at para. 394, where the Court stated: 'The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death'; See also: Magomed Musayev and others v. Russia, App. No. 8979/02, Eur.Ct. H.R, para. 162 (2008) [hereinafter: *Musayev* case], where it was held that an investigation carried out by Russia did not satisfy the necessary conditions, since the evidence was not sufficiently collected or documented. The authorities, *inter alia*, did not prepare a detailed list of the dead and did not attach precise details of the location of the incident, even though these were definitely known; Gül v. Turkey, App. No. 22676/93, Eur.Ct. H.R, paras. 89–90 (2000) [hereinafter: *Gül* case]; The Court reviewed a series of omissions in the authorities' investigation into an incident where a police officer opened fire on a civilian, claiming that it was in response to the civilian opening fire in the direction of the police. The omissions in the investigation included not locating the bullet that was supposedly fired by the civilian at the police, no examination of the supposed connection between the suspect and the handgun that was used to shoot at the police, no photographs taken of the firearms at the scene of the incident. On the basis of these omissions, the Court found that the investigation did not comply with the required conditions.

> authorities should adopt in providing for the proper examination of the circumstances. ... Nor can it be said that there should be one unified procedure satisfying all requirements. ... [T]he court considers that the requirement of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, the various procedures provide for the necessary safeguards in an accessible and effective manner.[240]

The Court has continued this position in subsequent decisions where it has held that the investigation procedure that should be adopted in each particular case may vary according to the circumstances.[241] Notwithstanding this approach, the Court has articulated securing evidence as a relevant procedure in all investigations. The Court emphasized the importance of securing evidence from the beginning of the investigative process. The Court held that: '[t]hus it cannot be said that the domestic authorities took promptly any and all reasonable steps available to them to secure evidence which would have enabled

240 See: *McKerr* case, *supra* note 165, at para. 159; See also: Hugh Jordan v. U.K., App. No. 24746/94, Eur.Ct. H.R, para. 143 (May. 4, 2001) [hereinafter: *Jordan* case].

241 See: *Avşar* case, *supra* note 238, at para. 393; See also: *Jordan* case, *supra* note 240, at para. 105; App. No. 37715/97, Eur.Ct. H.R, para. 88 (2001); Ayhan v. Turkey, App. No. 41964/98, Eur.Ct. H.R, para. 86 (2006) [hereinafter: *Ayhan* case]. See also: *Al–Skeini* case, *supra* note 169, at paras. 163 and 165, which deals specifically with the question of the obligation to investigate in an armed conflict. See also: *Isayeva, Yusupova and Bazayeva* case, *supra* note 108, at para. 209; Isayeva v. Russia, App. No. 57950/00, Eur.Ct. H.R, para. 210 (2005) [hereinafter: *Isayeva* case]; These two cases examined an aerial attack that hit civilians who tried to flee from the area of the fighting. The Court examined in depth the investigation proceedings and emphasized, *inter alia*, that insufficient efforts were made to collect details about the declaration of the 'safe passage' and the identity of the officers that were responsible for coordinating the safe passage of civilians (*Isayeva, Yusupova and Bazayeva* case, at para. 222; *Isayeva* case, at para. 219). Moreover, the Court found that the District Prosecutor's request for a plan of the operation was not produced; relevant documents, such as the campaign journal, were not properly examined; and insufficient efforts were made to locate the victims of and witnesses to the incident (*Isayeva, Yusupova and Bazayeva* case, at paras. 220–225; *Isayeva* case, at paras. 219–224).

For an alternative interpretation of the issue, See: *Chevalier–Watts, Effective Investigations*, *supra* note 165, at 715–717, where the *Yusupova and Bazayeva* case and the *Isayeva* case were specifically considered, and Chevalier–Watts deduces that in both of these cases, the Court found that the Russian authorities had clearly fallen below the minimum standard required, and therefore the Court considered at length the manner in which the investigation was carried out. According to Chevalier–Watts's analysis, it appears that since the judgment in *McKerr* case, in complex political and humanitarian situations, the Court has made a more thorough examination of the manner in which the investigation was carried out; see also at 721.

them to bring light on the circumstances of the suspect death'.[242]

83. The Inter–American Court of Human Rights also interprets the principle of effectiveness and thoroughness to be measured by the 'means' exercised in an investigation. In *Castro v. Peru*, the Court provided useful guidance on the implementation of this principle:

> [I]n order to conduct an effective and expedious [sic] investigation, the investigating body must use all the means at its disposal to carry out all measures and investigations necessary to shed light on the fate of the victims and identify the [sic] responsible ... For this, the State will guarantee that the authorities in charge of the investigation have the logistic and scientific resources necessary to collect and process evidence, and more specifically, the power to access to [sic] the documents and information relevant to the investigation of the facts denounced and that they be able to obtain evidence of the locations of the victims.[243]

84. In summary, effectiveness and thoroughness concern the means of carrying out an investigation in order to achieve the intended purpose of uncovering the truth. This principle relates to general procedural measures, such as the collection and preservation of evidence, including the quality of the autopsy and witness testimony, on which an 'effective investigation' should rest.

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242 See: Eremiášová and Pechová v. The Czech Republic, App. No. 23944/04, Eur.Ct. H.R, para. 146 (Feb. 16, 2012).

243 See: Anzualdo Castro v. Peru, Inter–Am. Ct. H.R., (Ser. C) No. 202, paras. 135 (Sep. 22, 2009); It should be noted that in cases concerning alleged arbitrary deprivation of life, the Inter–American Court of Human Rights has had a preference to adopt a list of minimum requirements when interpreting the principle of effectiveness and thoroughness which is based on the United Nations Manual on the Effective Prevention and Investigation of Extra–Legal, Arbitrary and Summary Executions; See for example: *Sánchez* case, *supra* note 200, at paras. 126–127; Mapiripán Massacre v. Colombia, Inter–Am. Ct. H.R., (Ser. C) No. 134, para. 224 (2005) [hereinafter: *Mapiripán* case], where the Court noted that: 'The State authorities in charge of an investigation must seek, at the least, *inter alia*: a) to identify the victim; b) to obtain and preserve evidence regarding the death, so as to aid any potential criminal investigation regarding those responsible; c) identify possible witnesses and receive their statements regarding the death under investigation; d) establish the cause, manner, place and time of death, as well as any pattern or practice that may have caused the death; and e) differentiate between natural death, accidental death, suicide, and homicide. It is also necessary to exhaustively investigate the crime scene, autopsies and analysis of human remains must be conducted rigorously, by competent professionals, applying the most appropriate procedures'.

4. Promptness

85. The principle of promptness dictates that an investigation should begin as soon as practically possible after the alleged incident and that unreasonable delays in the investigation must be avoided. The Commentary on Article 146 of the Fourth Geneva Convention asserts that while dealing with serious violations, States should act as quickly as possible, in order to ensure that an alleged perpetrator is arrested and brought to justice with all due speed.[244] Human rights law also places a strong emphasis on the need for investigations to be undertaken without delay.[245] Time is a major factor that affects the ability to collect and preserve evidence, since crime scenes change, evidence disappears, memories fade, and witnesses may be threatened or might collude. Thus, collecting evidence promptly complements the principle of effectiveness and thoroughness. Furthermore, conducting an investigation within a reasonable timeframe can contribute to the perception that the law is being enforced and justice is being done. Important fora have noted this connection between promptness and public confidence in the law.[246]

86. Human rights bodies provide guidance on the reasonable timeframe for the commencement of an investigation. The Committee Against Torture held that delays of 10–15 months between the alleged incident and the opening of the investigation were unreasonable.[247] In the *Ramsahai* case the European Court of Human Rights noted that the State investigators

244 See: COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 22, at 593.

245 See: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 32, at Article 12; UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22, where it is stated that: 'In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control'.

246 See: *Jordan* case, *supra* note 240, at para. 108; See also: Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the committee of ministers on 30 March 2011.

247 See: Halimi–Nedzibi v. Austria, Comm. No. 8/1991, U.N. Doc. A/49/44, para. 13.5 (Nov. 18, 1993), where it is noted that: 'The Committee considers that *a delay of 15 months* before an investigation of allegations of torture is initiated, *is unreasonably long* and not in compliance with the requirement of Article 12 of the Convention' [emphases added]; See also: M'Barek v. Tunisia, Comm. No. 60/1996, U.N. Doc. CAT/C/23/D/60/1996, paras. 11.5–11.7 (Jan. 24, 2000).

should be able to appear on the scene of events within, on average, no more than an hour and a half after the incident. The Court further held that the 15½ hours that passed between Ramsahai's death and the involvement of the relevant investigative authorities were an unreasonable delay.[248] These examples allude to the legal requirement to commence an investigation as soon as the obligation to investigate arises.

87. In terms of the duration of an investigation, in *Abad v. Spain*, the Committee Against Torture held that 10 months was an unreasonable length of time for an investigation. In that case, there were gaps of one to three months between different stages of the medical examination and the ensuing reports, and the Committee found this to be an unacceptable delay.[249] The European Court of Human Rights has similarly shown little tolerance towards pending investigations long after the incident had occurred.[250] Thus, for example, In *Hugh Jordan v. the United Kingdom*, the Court found that the failure to conclude an investigation over eight years after the events at hand was inadequate, even though the applicant himself requested the adjournments in the investigation. The Court held:

> If long adjournments are regarded as justified in the interests of procedural fairness to the victim's family, it calls into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family.[251]

248 See: *Ramsahai* case, *supra* note 215, at paras. 334 and 339; See also: Çiçek v. Turkey, App. No. 25704/94, Eur.Ct. H.R, para. 149 (Feb. 27, 2001), where the European Court of Human Rights noted the long time that had passed until the opening of the investigation (a year and a half) and until the hearing of evidence (three and a half years) from the date of the incident.

249 See: Encarnación Blanco Abad v. Spain, Comm. No. 59/1996, U.N. Doc. CAT/C/20/D/59/1996, para. 8.7 (May 14, 1998).

250 For example: Tanrikulu v. Turkey, App. No. 23763/94, Eur.Ct. H.R, para. 109 (Jul. 8, 1999), where the Court criticized the lack of investigative activity or progress more than a year after the event.

251 See: *Jordan* case, *supra* note 240, at para. 138.

88. The requirement to conduct an investigation promptly has also been affirmed by the Inter–American Commission of Human Rights:

> The Commission finds that, as a general rule, a criminal investigation should be carried out promptly to protect the interests of the victims and to preserve evidence, and that, in this case, the time elapsed without an effective investigation, prosecution, and punishment of all those responsible, constitutes unwarranted delay and is an indication of the scant probability of the effectiveness of this remedy.[252]

89. In summary, an 'effective investigation' must be conducted promptly. Delays in the commencement or the duration of an investigation may create evidentiary problems and detract from the public's confidence that justice will be served.

5. Transparency

90. This principle concerns the need for openness, communication and accountibility in the investigative process. It is derived from several rationales, including the need to ensure a culture of accountability, and public scrutiny of law enforcement and legal authorities as well as guaranteeing public confidence in the legal system and the rule of law.[253]

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252 See: Marco Antonio Servellón García et al. v. Honduras, Inter–Am. Comm. H.R. Case 12.331, Report No. 16/02, Doc. 5 rev. 1 at 348, para. 31 (2002); See also: *Molina* case, *supra* note 52, at para. 154; *Mapiripán* case, *supra* note 243, at para. 217. It should be noted that the Inter–American Commission of Human Rights, when it seeks to analyze the standard of promptness, tends to consider several criteria, including the time that has passed since the date of the incident, the stage of the investigation, the complexity of the case, procedural considerations in managing the proceeding against the parties and the conduct of the investigation authorities. Thus, the Commission held in *Molina* case, at para. 154: 'To establish whether an investigation has been undertaken "promptly", the Commission considers a series of factors, such as the time that has elapsed since the crime was committed, if the investigation has passed the preliminary stage, the measures adopted by the authorities and the complexity of the case'.

253 See for example: Anguelova v. Bulgaria, App. No. 38361/97, Eur.Ct. H.R, para. 140 (Jun. 13, 2002) [hereinafter: *Anguelova* case].

91. The Commission did not identify an explicit recognition of this principle in international humanitarian law sources.[254] International human rights sources, however, do address the duty to maintain transparency in an investigation. These sources suggest that this duty is composed of two discrete aspects: the first is a duty to inform victims of crimes of their rights to receive information with regard to the circumstances of the said offense (or in the event that the victim was killed during the incident under investigation, that the victim's family members receive such information).[255] This aspect derives, *inter alia*, from the concept of restorative justice.[256] For example, in *Danilo Dimitrijevic v. Serbia and Montenegro*, the Committee for the Convention against Torture noted the failure of the prosecutor to inform the complainant whether an investigation was being conducted and, if any, the results of such investigation.[257] The second aspect involves a duty to publish a comprehensive public report regarding investigations

254 Neither the Goldstone Report nor Schmitt consider the principle of transparency to be one of the relevant principles for conducting an investigation under international humanitarian law; See: Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact–Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, para. 121 (2009); *Schmitt, Investigating Violations*, *supra* note 82, at 83.

255 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 16; UN Principles, Effective Investigation of Torture 2001, *supra* note 192, at Article 4; UN Guidelines, Role of Prosecutors 1990, *supra* note 207, at Article 13(d). See also: UN Principles, Remedy for Victims of Violations 2005, *supra* note 171, at Article 11(c) and 24. See: *McKerr* case, *supra* note 165, at para. 115, where the Court stated that: 'In all cases, however, the next–of–kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'; The Court did not explain the various circumstances that may affect the scope of the family's involvement. It is possible to assume that the Court's intention was to give the investigating authority discretion to decide in cases involving incidents which, if disclosed, might frustrate the purpose of the investigation or the authority's operation.

256 There are various conceptions of 'restorative justice'. However, central to this theory of justice is a cooperative process of reparation or restoration between the offender and the victim as well as other interested parties. It aims to achieve offender accountability, reparation to the victim and full participation by those involved. Restorative justice attempts to restore the balance between the parties, repair the harm, and heal the relationships. See: John Braithwaite, *Restorative Justice*, *in* The Handbook of Crime and Punishment 323–344 (Tonry ed., 1998); See also: UNGA Res 40/34 Declaration of Basic Principles of Justice for Victims of Crime and Abuse for Power, Nov. 29, 1985, 96th plen mtg, (annex).

257 See for example: *Dimitrijevic* case, *supra* note 196, at para. 7.3, which concerned a Serbian citizen who was brought to a police station in Serbia, and he was beaten by police, deprived of food and water and his request for medical attention was denied. When he was released, he filed a complaint at the office of the District Prosecutor about the way the police treated him, together with medical documentation of his injuries. The Committee Against Torture held that the prosecutor's failure to inform the complainant of the opening of an investigation in his case or its results, prevented the complainant from pursuing a 'private prosecution' of his case, and that as a result, the duty to carry out an effective investigation was violated. See also: Mr. Besim Osmani v. Republic of Serbia, Comm. No. 261/2005, U.N. Doc. CAT/C/42/D/261/2005, para. 10.7 (May 25, 2009).

and their findings in order to guarantee credibility and public confidence in a system or an institution.[258]

92. The jurisprudence of the European Court of Human Rights has illuminated both these aspects of transparency. The Court requires that there be sufficient public accountability as well as the involvement of the victim's family during the investigation process. In relation to the former, the Court found there was no public scrutiny of an investigation because reports and their findings were not published.[259] The Court has repeatedly stated:

> [T]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.[260]

In relation to the involvement of the next of kin, the rulings of the Court have elucidated what this involvement may entail. In *Güleç v. Turkey* the Court's criticism of the investigation included the fact that the complainant (the victim's father) was not given the opportunity to participate in the process and did not receive notice of the significant decisions in the examination of the case.[261] According to the Court's decisions, participation of family members extends beyond notifying the family of developments in the investigation and includes allowing family members to testify as witnesses[262] and giving them access to documents relevant to the investigation and court proceedings.[263] In a case concerning the siege of the Dubrovka theatre, the Court interpreted this aspect of transparency more

258 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 17; UN Principles, Effective Investigation of Torture 2001, *supra* note 192, at Article 5(b).

259 See: *McKerr* case, *supra* note 165, at para. 141.

260 *Id.*, at para. 115; *Jordan* case, *supra* note 240, at para. 109; *Isayeva* case, *supra* note 241, at para. 140; *Anguelova* case, *supra* note 253, at para. 140; *Kolevi* case, *supra* note 218, at para. 194.

261 See: Güleç v. Turkey, App. No. 54/1997/838/1044, Eur.Ct. H.R, para. 82 (Jul. 27, 1998).

262 See: *Gül* case, *supra* note 239, at para. 93.

263 See: *Oğur* case, *supra* note 202, at para. 92.

narrowly in determining that it must be applied in light of achieving an effective investigation:

> ... the materials and conclusions of the investigation should be sufficiently accessible for the relatives of the victims … to the extent it does not seriously undermine its efficiency.[264]

93. The Inter–American Court for Human Rights has demonstrated that the two aspects of the transparency principle are discrete and are not dependant on one another:

> The state must ensure the next of kin of the victims full access and the capacity to take part in all the stages of the investigation and trial of those responsible, pursuant to domestic law and the American convention. In addition, the results of the corresponding procedures should be publically disclosed thereby permitting Brazilian society to know the facts of the present case, as well as those responsible.[265]

94. In sum, the principle of transparency contributes to achieving a culture of accountability; it requires a sufficient degree of public scrutiny in order to conduct an effective investigation and addresses the right of victims to have access to information regarding the circumstances of the offense.

Summary of the General Principles

95. The general principles that apply to 'effective investigations' are enshrined in various international documents. Most of these sources are 'soft law', but it is possible (and desirable) to refer to them for interpretive guidance on this matter. In order to achieve an 'effective investigation', the

264 See: Finogenov and Others v. Russia, App. No. 18299/03 and 27311/03, Eur.Ct. H.R, para. 270 (Dec. 20, 2011).

265 See: Gomes Lund et al. v. Brazil, Inter–Am. Ct. H.R., (Ser. C) No. 219, para. 257 (Nov. 24, 2010); See also: *Mapiripán* case, *supra* note 243, at para. 219.

investigation must be conducted independently (both institutionally and practically), impartially (without personal bias), effectively and thoroughly (the means must achieve the intended purpose of uncovering the truth), promptly (avoiding delays in the commencement and duration) and transparently (providing public scrutiny and addressing victims' rights). Let us now turn to examine the way in which the context of armed conflict restrains or modifies the application and the implementation of these principles.

Application of the General Principles to Investigations in the Context of an Armed Conflict

96. The question of whether the context of an armed conflict alters the implementation of the general principles for conducting an 'effective investigation' is a matter of law and of practical reality. Although there is no *fundamental* difference between the principles that should govern investigations under human rights and international humanitarian law,[266] the existence of an armed conflict may preclude application of the principles in the same precise way as in a law enforcement context. The type of operation during armed conflict may also affect the extent to which the principles apply. In the context of armed conflict, the assumption is that the situation is governed by the rules regulating the conduct of hostilities. In law enforcement operations during armed conflict and in particular during occupation, application of the general principles will be more akin to the international human rights law regime.

97. Various international human rights fora have recognized that the implementation of the general principles depends upon the circumstances and that the existence of an armed conflict may well restrict the application of the principles for an effective investigation. The UN Human

266 See *supra*, at para. 63.

Rights Council International Independent Fact–Finding Mission Report (Tomuschat Report) stated:

> The Committee believes that the gap between the expansive standards under IHRL [international human rights law] and the less defined standards for investigations under IHL [international humanitarian law] is not so significant… Nonetheless, there are constraints during armed conflict that do impede investigations.[267]

Furthermore, these limitations were recognized by the European Court of Human Rights in the *Al–Skeini* case:

> It is clear that where the death to be investigated … occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators…[268]

While the Court in *Al–Skeini* did not consider that the existence of an armed conflict precluded the applicability of the European Convention for Human Rights (see paragraph 57) it did recognize the need to pay careful attention to the reality of the armed conflict in determining the *manner* of carrying out an investigation.

In the context of armed conflict, the general principles are transferrable to varying degrees and they must be considered in light of the surrounding circumstances as well as the underlying principles governing international humanitarian law. The extent to which they apply is determined by the overall purpose of achieving an 'effective investigation'. Let us now turn to examine how each principle applies during armed conflict.

267 See: *Tomuschat Report*, *supra* note 194, at paras. 30–32.

268 See: *Al–Skeini* case, *supra* note 169, at para. 164.

1. Independence and Impartiality

98. Although the Commission considered it important to distinguish between independence and impartiality in its earlier analysis of the general principles, for the purposes of understanding how these principles are adapted to a context of armed conflict, they can be discussed together. As previously established, the existence of a military justice system does not of itself compromise the requirement of independence,[269] but in order to adhere to the principle of independence within such a system, an investigation must be conducted outside the chain of command. An example in the military context where the Court addressed *operational independence* is the *Al–Skeini* case:

> The Court considers... that the fact that the Special Investigation Branch was not "free to decide for itself when to start and cease an investigation" and did not report "in the first instance to the [Army Prosecuting Authority]" rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2.[270]

Therefore, during armed conflict, an investigator must be independent from those under investigation and certainly not subject to the same chain of command.[271]

99. The principle of independence is shaped by the context of hostilities in that it is often important that the investigator possess operational and technical expertise. Schmitt provides an instructive example:

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269 See *supra*, at para. 73.

270 See: *Al–Skeini* case, *supra* note 169, at para. 172.

271 See also the ruling of the English Court of Appeal, in *Mousa* case, which examined an investigation carried out by the Iraq Historic Allegations Team (IHAT), which was established by the Ministry of Defence and charged with investigating allegations of abuse by members of the British armed forces in Iraq. The Court held that IHAT lacked practical independence, at least as a matter of 'reasonable perception', because of the potential involvement of the Provost Branch members of IHAT in the said events. See: Mousa, R (on the application of) v. Secretary of State for Defence and Anr, [2011] EWCA Civ 1334 (Nov. 22, 2011) (Court of Appeal (Civil Division)), paras. 36–38 (U.K).

> While impartiality and independence are investigatory requirements, so too is *effectiveness*. An investigator who does not understand, for example, weapons options, fuzing, guidance systems, angle of attack, optimal release altitudes, command and control relationships, communications capabilities, tactical options, available intelligence options, enemy practices, pattern of life analysis, collateral damage estimate methodology, human factors in a combat environment, and so forth, will struggle to *effectively scrutinize* an air strike.[272]

100. Thus, an adequate understanding of the nature of the operation must be reconciled with the required separation from the chain of command. The investigator's separation from the chain of command is necessary to ensure that he has no potential involvement in the events under consideration and therefore neither possible partiality nor perception of bias in the assessment of the incident. In a situation of armed conflict, separation from the chain of command is not inconsistent with the requirement that the investigator also has sufficient operational knowledge in order to achieve an 'effective investigation'.

2. Effectiveness and Thoroughness

101. During an exchange of military hostilities in the context of an armed conflict, the relevant authorities' practical ability to conduct an investigation effectively and thoroughly is less obvious. The site of the incident may be under the control of opposing forces, resources may be limited and the means of conducting the investigation, for example, the ability to interview witnesses or conduct an autopsy, may be unavailable.[273]

272 See: *Schmitt, Investigating Violations, supra* note 82, at 84 [emphases added].

273 See for example: *Tomuschat Report*, *supra* note 194, at para. 32, where it is noted that: 'The nature of hostilities might obstruct on–site investigations or make prompt medical examinations impossible. The conflict might have led to the destruction of evidence, and witnesses might be hard to locate or be engaged in conflict elsewhere'; See also: *Schmitt, Investigating Violations*, *supra* note 82, at 54, which notes that: 'Evidence may have been destroyed during the hostilities, civilian witnesses may have become refugees or internally displaced persons, military witnesses may be deployed elsewhere or be engaged in combat, territory where the offense occurred may be under enemy control, forensic and other investigative tools may be unavailable on or near the battlefield, military police may be occupied by other duties such as prisoner of war handling, legal advisers may be providing conduct of

In this regard, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions stated that:

> It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non–derogable character of the right to life – but they may affect the modalities or particulars of the investigation. ... *On a case–to–case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.*[274]

While the thoroughness and effectiveness of an investigation during an armed conflict may not translate to the same evidentiary standards as during peacetime, the standards must still be high enough to reach conclusive and reliable findings. Thus, for example, the European Court held in the *Al–Skeini* case:

> [T]he investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the *reasonable steps available* to them to *secure the evidence* concerning the incident, including *inter alia* eye–witness testimony, forensic evidence and, *where appropriate*, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical finings, including the cause of death.[275]

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hostilities advice, judicial bodies may be distant from the theatre of operations, communications may be degraded, travel may be hazardous, and so forth'.

274 See: Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2006/53, para. 36 (Mar. 8, 2006) [emphasis added].

275 See: *Al–Skeini* case, *supra* note 169, at para. 166 [emphases added].

Despite the evidentiary constraints that may exist during armed conflict, the evidence that is available must be *thoroughly* secured and all feasible reporting must be completed.

102. In sum, although the nature of hostilities may limit the means available to conduct an investigation, reasonable measures must be taken to collect and secure accurate and credible findings for the investigation and it must be conducted professionally.

3. Promptness

103. The requirement of promptness begins as soon as the duty to investigate arises (see paragraph 85). In applying the promptness requirement to armed conflict, determining the reasonableness of a delay must be assessed according to the surrounding circumstances and according to the scope and scale of the violence. From the jurisprudence of the European Court it appears that unreasonable delays are examined against the backdrop of the surrounding circumstances of armed conflict. For example, in a number of the cases concerning the situation in the south–east region of Turkey, the Court acknowledged that the climate of violence might place difficulties on conducting an investigation, yet it asserted that such a climate should not prevent the authorities from responding actively and with reasonable expedition to an incident.[276] Furthermore, in *Bazorkina v. Russia* the Court stated that:

> [W]hile accepting that some explanation for these delays can be found in the exceptional circumstances that have prevailed in Chechnya … the Court finds that in the present case they clearly exceeded any acceptable limitations on efficiency that could be tolerated in dealing with such a serious crime.[277]

276 See for example: Ergi v. Turkey, App. No. 66/1997/850/1057, Eur.Ct. H.R., Judgement, paras. 85 (1998) [hereinafter: *Ergi* case]; Yaşa v. Turkey, App. No. 63/1997/847/1054, Eur.Ct. H.R, para. 104 (Sep. 2, 1998); Mahmut Kaya v. Turkey, App. No. 22535/93, Eur.Ct. H.R, para. 107 (Mar. 28, 2000).

277 See: Bazorkina v. Russia, App. No. 69481/01, Eur.Ct. H.R, para. 121 (Jul. 27, 2006).

A similar sentiment was adopted in the *Al–Skeini* case, where the Court noted that 'concrete constraints may ... cause an investigation to be delayed'.[278]

104. The Inter–American Commission on Human Rights has also examined the complexity of the circumstances of the case when determining the reasonableness of delays in investigations. In *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia* (hereinafter: the *Molina* case), a case which concerned the death of a civilian in the course of a military operation carried out by Colombian forces on Ecuadorian territory, the Inter–American Commission held that international human rights law should be interpreted in light of the rules of international humanitarian law, but it emphasized that an investigation should be launched as soon as possible:

> As a general rule, the Commission determines that "a criminal investigation" must be undertaken promptly to protect the victims' interests and preserve evidence. … When a State alleges the complexity of facts as factor [sic] to be taken into account in determining whether or not there has been an unwarranted delay and to examine whether the authorities have acted diligently in the investigations, it must explain specifically in what way this complexity and other difficulties caused the delay.[279]

105. Therefore, the reasonableness of delays must be assessed according to the surrounding circumstances and the intensity of violence. Adhering to the principle of promptness during armed conflict may be helpful in fulfilling the principle of effectiveness and thoroughness, for example, by ensuring the availability of evidence. Notwithstanding the complementary dynamic that can exist between these two principles, when an investigation *cannot* be promptly conducted, securing all available and accessible evidence becomes even more crucial.

278 See: *Al–Skeini* case, *supra* note 169, at para. 164.

279 See: Molina case, supra note 52, at paras. 154 and 157.

4. Transparency

106. As noted above, there is no explicit recognition of the principle of transparency in international humanitarian law.[280] The above analysis suggests that the principle of transparency is composed of two aspects and although there is a relationship between these two aspects, they clearly facilitate different ends: 'victims' rights' and 'accountability via public scrutiny'.

International humanitarian law does not require that investigators and prosecutors comply with the rules of transparency that relate to specific victims' rights. The Tomuschat Report states:

> The overriding concern of IHRL to protect the rights and freedoms of individuals from the abuse of State power is not the primary focus of IHL. The latter seeks first to balance the lawful use of force with the protection of individuals. Consequently, *some human rights standards, such as the involvement of victims in investigations, while desirable, are not requisite for evaluating the inquiries into alleged IHL violations*.[281]

The Commission shares the view that complying with the standard of transparency is indeed desirable, as it enhances public scrutiny and contributes to accountability. The accountability via public scrutiny aspect of the requirement of transparency contributes to the realization of some of the purposes that are central to the duty provided in international humanitarian law, namely increasing compliance and deterring the commission of future violations. This aspect of transparency may be achieved, *inter alia,* through publishing guidelines, establishing reporting mechanisms, and making publicly available relevant information such as statistics.

280 See *supra*, at paras. 63 and 91.

281 See: *Tomuschat Report*, *supra* note 194, at para. 33 [emphasis added].

107. It is noteworthy that the transparency requirement (both in its full operation in investigations regulated by human rights norms and its more limited application under international humanitarian law) must be implemented and adjusted to the circumstances. The Tomuschat Report states:

> [T]he level of transparency expected of human rights investigations is not always achievable in situations of armed conflict, *particularly as questions of national security often arise*.[282]

Summary of the General Principles in the Context of an Armed Conflict

108. **In summary, the mere existence of an armed conflict does not negate the duty to conduct an 'effective investigation' in accordance with the accepted general principles. Application of these principles to the investigative process enhances accountability during armed conflict. The degree of compliance with the general principles is measured by the overall purpose of achieving an 'effective investigation'. In adopting this approach, the Commission has relied on the *lex generalis* of international human rights law, which has more nuanced principles for investigation, to fill the *lacuna* in international humanitarian law and complementing it on the details concerning how to conduct an investigation. The precise content of the general principles has been determined carefully, with due regard for the contextual circumstances. This analysis has demonstrated the way in which each principle applies to the investigative process in the context of armed conflict**.

282 *Id.*, at para. 32 [emphasis added].

Fact–Finding Assessment

109. As we have noted earlier, in the context of an armed conflict, there are instances in which a fact–finding assessment is required to determine whether an investigation should ensue. The main purpose of this assessment is to *collect sufficient information* about the incident. In addition, it must *facilitate* a potential investigation, and *not hinder* it. Therefore, the principles that govern the conduct of a fact–finding assessment are determined in reference to the overall purpose of the assessment.

110. Accordingly, a fact–finding assessment must be conducted by an institution or individual with sufficient operational expertise in order to facilitate a subsequent investigation. Another way that a fact–finding assessment can facilitate an investigation is by ensuring that the quality of evidence is of a high enough standard that it can be relied on in a subsequent investigation. A fact–finding assessment must be conducted in such a way as not to hinder an investigation, for example, by tainting the evidence and rendering the subsequent investigation ineffective. In *Ergi v. Turkey*, for example, the European Court of Human Rights criticized the reliability of the incident report conducted by the gendarmerie officer and the heavy reliance on it by the public prosecutor. The gendarmerie officer who conducted the incident report did not have statements from eye–witnesses, nor did he question the security forces at the time of the incident in any detail.[283] Because the quality of the incident report was poor, the Court found it problematic that the prosecutor relied on it to support his findings. A fact–finding assessment lacking professionalism and expertise, which is relied on in a subsequent investigation, may render that subsequent investigation ineffective.

111. Promptness is also required for a fact–finding assessment because a failure to conduct it promptly would cause unjustified delays in a

283 See: *Ergi* case, *supra* note 276, at paras. 83–85.

subsequent investigation, rendering that subsequent investigation ineffective. While the jurisprudence of the European Court has focused on the commencement of an *investigation*, the Court has emphasized the importance of promptness at the preliminary stage as well. Similarly, In *Musayev and Others v. Russia*, the Court did not find any justification for a material delay in the *commencement of an investigation or, at least, preliminary procedures*. The Court found the large number of deaths during a Russian military operation in the context of hostilities between Russian forces and Chechen fighters as a reason to accelerate the opening of the investigative process.[284] In addition, in *Al Skeini*, the Court emphasized the importance of a 'prompt response by authorities'. [285]

112. In sum, the primary objective of a fact–finding assessment is to collect the relevant information about the alleged incident at a *preliminary stage*. The fact–finding assessment must be carried out in a way that fulfils its overall purpose, in other words, it must be carried out with professionalism, expertise, and promptness so that it facilitates a potential investigation and does not hinder it.

284 See: *Musayev* case, *supra* note 239, at para. 160.

285 See: *Al–Skeini* case, *supra* note 169, at para. 167; *Isayeva* case, *supra* note 241, at para. 213; Sasita Israilova and Others v. Russia, App. No. 35079/04, Eur.Ct. H.R, para. 111 (Oct. 28, 2010).

SUMMARY

113. The duty to conduct an investigation whenever there is a reasonable suspicion of the commission of a war crime is well established in international law. In the absence of a reasonable suspicion of a war crime there is still a duty to conduct a fact–finding assessment when the information is only partial or circumstantial, particularly where there has been an exceptional event or incident such as unanticipated civilian casualties. If a fact–finding assessment reveals circumstances that give rise to a reasonable suspicion of a war crime then a subsequent investigation is required. It is essential that the fact–finding assessment does not compromise the effectiveness of a potential investigation. It is also important to note that there is a legal duty to conduct an examination of all suspected violations of international humanitarian law that do not reach the threshold of a war crime. Confirmed violations should result in appropriate administrative, disciplinary, or penal measures, depending on the severity of the violation.

114. The specific provisions of international humanitarian law applicable to an armed conflict indicate that the death or injury of an individual does not, of itself, raise a reasonable suspicion for the commission of a war crime. Without additional information establishing such a suspicion, there is no legal obligation to conduct an investigation. In contrast, in an occupied territory, where the Occupying Power is engaged in law enforcement operations, such as maintaining public order or responding to civil disturbances and riots, the death or serious injury of an individual caused by the security forces, of itself, triggers an immediate obligation to initiate an investigation.

115. When an investigation during armed conflict is required, it must be conducted in accordance with the general principles for an 'effective investigation', i.e., independence, impartiality, effectiveness

and thoroughness, promptness, and the public scrutiny aspect of transparency. The precise content of the general principles may vary according to the specific context and the prevailing conditions, but the fundamental obligation to undertake an investigation effectively cannot be waived. Where needed, a fact–finding assessment must be conducted in a manner that achieves its purpose.

116. This chapter has outlined the obligation to examine and investigate complaints and claims of violations of international humanitarian law. The chapter established the content of this duty by reference to the relevant rules of international law.

117. The normative framework, as set out in this chapter, will form the basis for the analysis in the following chapters of the Report, which will review the manner in which complaints and claims regarding violations of international humanitarian law are examined and investigated in Israel (see below in chapter C), and the compliance of these mechanisms with the State of Israel's international law obligations (see below in chapter D). Before reviewing the Israeli practice, the Commission will first turn to a comparative study of the practice in this area of six other countries.

CHAPTER B: COMPARATIVE SURVEY OF INVESTIGATIVE SYSTEMS RELEVANT TO LAWS OF ARMED CONFLICT

INTRODUCTION

1. This chapter distils the results of a comparative survey, initiated by the Commission, of the laws, institutions and processes through which six other countries– the US, the UK, Canada, Australia, Germany and the Netherlands – investigate alleged violations of international humanitarian law – or as they are referred to in the country reports the law of armed conflict – and, where there has been a violation, bring the individuals concerned to justice.[1]

The chapter draws on the detailed country reports (reproduced in Annex C) to summarize the position in other jurisdictions on some of the most relevant questions that pertain to an assessment of Israel's current law and practice. The focus is on possible breaches of the law of armed conflict committed by members of the armed forces, rather than other security services (although the country reports do provide some limited information on the latter issue).

The introduction to the chapter explains the purpose of the comparative survey and outlines the methodology followed. It then makes some general comments on the approach of the investigative systems surveyed. The first section of the chapter outlines relevant international and domestic normative frameworks ('why investigate and what to investigate?'). The second section identifies institutions and personnel

1 This chapter adopts the terminology of the country reports, even where the meaning of such terms differs from how they are used in the other chapters of this Report. For example, this chapter retains the term 'law of armed conflict' because some of the countries surveyed (particularly the US) do not use 'international humanitarian law' widely in their law and policies; see: Sean Watts, *Report on United States Law of Armed Conflict Investigations and Prosecution Practices*, at para. 4 [hereinafter: *The US report*]. Another example is the uniform use of the term 'investigation', even when referring to other inquiry processes.

involved in the investigation and (where necessary) criminal or disciplinary proceedings following complaints of violation of the law of armed conflict in the countries surveyed ('who investigates?'). In the third section we will examine in detail the processes followed in each of the countries in relation to investigation and subsequent proceedings ('when to investigate and how to investigate?'). In the fourth section we will summarize key points of the different approaches, common trends and major differences between the countries that were surveyed.

Purposes of the Comparative Survey

2. This inquiry is intended to compare Israel's mechanisms for investigating complaints of violation of the law of armed conflict, outlined in Chapter C, with the approaches taken in other countries with highly developed systems for investigating violations and addressing them through criminal or disciplinary proceedings. Against this background the Commission will be able to constructively assess the efficacy of Israel's mechanisms, and collate examples that might assist in considering possible reforms. The Commission is aware that the law and practice adopted by States is shaped also by domestic law, policy considerations, military culture, operational concerns, and the distinct challenges presented by the varying number and scope of investigations.[2] However, despite these differences, the Commission is of the view that the comparative survey is extremely beneficial; it provides a wide range of mechanisms that countries

2 For statistics regarding the investigation (or other inquiries) and prosecution of alleged LOAC violations (e.g., numbers of complaints, matters investigated, charges laid, non–judicial action, trials, verdicts) see: *The US report*, *supra* note 1, at paras. 111–112; Holly MacDougall, *Canada: Investigation and Prosecution of Alleged Violations of the Law of Armed Conflict*, at paras. 136–143 and Annex A [hereinafter: *The Canadian report*]; Tim McCormack, *Australian Law and Practice relevant to Investigation and Prosecution of LOAC Violations*, at paras. 83–85 [hereinafter: *The Australian report*]; Peter Rowe, *Comparative Study of Other Systems for Investigating Alleged LOAC Breaches: The Law of the United Kingdom*, at paras. 4.22–4.24 [hereinafter: *The UK report*]; Wolff Heintschel von Heinegg & Robert Frau, *Investigation and Prosecution of Violations of the Law of Armed Conflict in Germany*, at Appendix V, paras. 24–28 [hereinafter: *The German report*]; T. D. Gill & J. J. M. van Hoek, *Netherlands: Investigation and Prosecution of Alleged Violations of the Law of Armed Conflict*, at paras. 84–85 [hereinafter: *The Netherlands report*].

may adopt in order to fulfill their obligations under international law, and it assists in critically assessing the pros and cons of each approach and its suitability to the legal and operational needs and realities in Israel.

The choice of countries surveyed has been driven primarily by the objective of examining other jurisdictions that might offer useful counterpoints to Israel's current mechanisms. Moreover, the six countries selected are among those that have sophisticated systems of investigation for law of armed conflict violations, and recent experience with these systems.[3] Moreover, the Commission sought to limit its comparative survey to countries that are widely accepted as generally committed to the rule of law and therefore to the implementation and enforcement of the laws of armed conflict. By this, the Commission set a high bar which deliberately eliminates the possibility of extracting the bare minimum practices that may constitute customary international law. Finally, all of the six countries surveyed have been engaged in extensive and diverse military operations in the recent past which included complex armed conflict situations involving non–State groups, hostilities conducted in close proximity to a civilian population and situations in which the classification of the conflict (international or non–international armed conflict) was less than definitive. Some of these countries have also been involved in a range of peace operations with much greater emphasis on the maintenance of law and order rather than on exchange of military hostilities.

The countries selected include four common law countries (the US, the UK,[4] Canada and Australia), and two civil law countries (Germany and the Netherlands). The common law countries all have distinct systems

3 Systems in four of the countries selected for comparison (the US, the UK, Canada and Australia) have already been the subject of conflicting assessments in some of the submissions received by this Commission. While these submissions have been helpful in many respects, the analysis presented in this chapter was prepared on the basis of reports by individual experts, in accordance with the process outlined in this chapter, and does not rely on assertions in submissions presented to the Commission.

4 The law examined is actually that of England and Wales, see: *The UK report*, *supra* note 2, at *fn* 3.

of military justice, albeit with considerable variation in the allocation of responsibility for decisions about investigation and subsequent proceedings. Germany and the Netherlands have no distinct system of military justice, in the sense of a capacity to try criminal offenses other than in the civilian courts (although the Netherlands has a specific Military Chamber of a civilian court that has jurisdiction where the accused is a member of the armed forces). However, in both Germany and the Netherlands military police play a role in investigating possible violations of the law of armed conflict for later prosecution (if appropriate) by civilian authorities.[5]

Methodology of the Comparative Survey

3. The comparative survey was conducted as follows: in the early stages of the survey a common questionnaire (see Annex C) was developed in order to elicit a comprehensive picture of the institutions and processes involved in each jurisdiction. The focus was on suspected violations committed by the armed forces, although some information was also sought about the law, processes and institutions relevant to investigations of violations by civilian security personnel.

The initial, general section of the questionnaire sought information on the overarching structure of national systems for investigating and prosecuting violations of the law of armed conflict, including an overview of relevant statutory and customary international law obligations, the basis of criminal jurisdiction in respect to violations of the law of armed conflict, and avenues other than prosecution that may be relevant to investigations of possible violations. The second section focused on the civilian justice

5 For different views on when the investigation practices of States become reflective of customary international law, see: Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 Harv. Nat. Sec. J. 31, 56 (2011); Amichai Cohen and Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflict*, *in* Yearbook of International Humanitarian Law, 37 (Michael N. Schmitt and Louise Arimatsu eds., 2011).

system as it pertains to the law of armed conflict, touching in particular on the status, role and independence of the Attorney–General and equivalent civilian prosecutorial authority, the civilian police and investigative authorities, and laws applicable to civilian security services such as the police and intelligence services. The third section explored in greater detail the nature and operation of the military justice system, including reporting and investigation processes, the status, role and independence of military investigators, legal advisers and prosecutors, the role of commanders in investigation and prosecution, and the administrative and disciplinary actions that may be taken alongside, or instead of, prosecution for violations of the law of armed conflict. A final section, on application of the policy in practice, sought further detail on concrete matters relevant to reporting and investigation of possible violations by the armed forces.

Experts on the law and practice in each jurisdiction were asked to prepare reports responding to the questionnaire. In some cases, after an initial review of draft reports, further information and detail were sought from the country experts on particular issues. This further information is reflected in the final reports.

This chapter is based primarily on the country reports and materials referred to therein, unless cited to another source. References to specific documents may be given in the case of direct quotation, but for the most part this chapter merely indicates the paragraphs of country reports in which relevant information and references may be found. In the event of any discrepancy between this chapter and a country report, reference should be made to the country report as the original and most detailed source of information. The country reports were received in August 2011, and while some updates were made, subsequent developments in the law and practice of individual countries have not been systematically included in this chapter.

4. Before embarking on a systemic presentation of the law and practice in the countries surveyed, it is important to note the extent to which the legal frameworks and systems of military and civilian justice relevant to the law of armed conflict have changed in recent decades, and are continuing to change.

All the countries surveyed, with the exception of the US, have made various statutory amendments in connection with ratification of the Rome Statute, some of them representing major changes to the scope of conduct that is criminalized, as well as to arrangements for prosecution. Countries that are Parties to the European Convention on Human Rights (UK, Germany, and the Netherlands) are bound to secure human rights to all individuals in their jurisdiction, an obligation that is increasingly interpreted to require extraterritorial protection of Convention rights for a range of individuals even in situations of armed conflict.[6]

Some countries have also made significant changes to their systems of military justice, whether in pursuit of best practice, or in response to concrete instances in which existing systems have not proved adequate to prevent, investigate and punish breaches of the law, or have failed to protect the rights of the accused. Canada has made various changes to its system of courts martial in order to ensure that the process complies with the right to a fair trial guaranteed by the Canadian Charter of Rights and Freedoms. Influenced in part by critical findings regarding the Canadian Forces' conduct in Somalia and difficulties in the military justice system, Canada undertook further reforms, implemented in 1999, to separate prosecutorial functions from the chain of command. A 2009 report of the Military Police Complaints Commission critical of the way in which the

6 See, for example: Al–Skeini and Others v. United Kingdom, App. No. 55721/07, Grand Chamber Eur. Ct. H.R., paras. 138 (Jul. 7, 2011) [hereinafter: *Al–Skeini* decision].

military police were operating in Afghanistan has prompted efforts to reinforce their independence. Australia embarked on a reform of its military system in 2006, involving the creation of a new Australian Military Court independent of the chain of command to replace existing systems of courts martial and Defence magistrates.[7] The United Kingdom has reformed, over a period of years, aspects of its military justice system to ensure that it respects the right to a fair trial under the European Convention on Human Rights and the Human Rights Act 1998. The Netherlands completely overhauled its military justice system in 1991, transferring jurisdiction over criminal offenses committed by the armed forces to the civilian justice system, and in 2006 introduced the system of 'After Action Reports' that supports the process of routine factual investigation of all civilian deaths or serious injuries.

As a general rule, the trend of these changes has been towards a more specialized and professionalized process of investigation and management of criminal or disciplinary proceedings, and greater insulation from the operational chain of command. The extent and general direction of change in other countries may be relevant to the lessons that can be drawn from this comparative exercise.

7 However, following a judicial ruling that certain aspects of the new Australian Military Court were unconstitutional, Australia returned to a system of courts martial as an interim measure: *The Australian report*, *supra* note 2, at paras. 7–11.

A. Normative Framework ('Why and What to Investigate?')

Applicable International Law

5. As noted above, much of the practice adopted in the countries surveyed concerning investigations of suspected violations of the law of armed conflict is shaped by domestic law and policy considerations, legal and military culture and operational concerns. That said, the international legal framework, and duties under the law of armed conflict, obviously set the parameters for the approach adopted. Moreover, human rights law and tribunals, and developments in international criminal law, are clearly important factors influencing recent changes to the various national approaches. This section sketches the position of the countries surveyed in relation to the law of armed conflict, international human rights law, and international criminal law.

Law of Armed Conflict

6. The countries surveyed take slightly different positions on the body of law of armed conflict that binds them. All the countries have accepted a basic core of law of armed conflict in ratifying the Geneva Conventions of 1949, and all the countries, other than the US, have ratified Additional Protocols I and II. Various sources indicate that some provisions of Additional Protocols I and II are accepted by the US as reflective of customary international law.[8]

8 *The US report*, *supra* note 1, at para. 7; These sources do not indicate a definitive position on the detailed requirements of Article 87, except to indicate that the US: 'support[s] the principle that the appropriate authorities... take all appropriate steps to bring to justice any persons who have willfully committed such acts... and make good faith efforts to cooperate with one another in this regard'; Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 Am. Univ. J. Int'l L. & Pol'y 419, 428 (1987).

International Human Rights Law

7. The countries surveyed have ratified some or all of the major international human rights treaties, although they take different positions on their applicability (and that of customary international human rights law) in situations of armed conflict.

The US takes the view that international human rights treaty law does not apply extraterritorially. Even if it did, the US contends that, during armed conflict, the law of war operates as a *lex specialis* displacing provisions of more general legal regimes such as international human rights law.[9] The combined positions on the non–extraterritoriality of international human rights law and on international humanitarian law as *lex specialis* greatly reduce the extent to which international human rights law, in the view taken by the US, is applicable in situations of armed conflict, if at all.[10] Canada takes the position that international human rights law applies at all times, whether in situations of peace or armed conflict, but that, in a situation of armed conflict, relevant human rights principles can only be decided by reference to the law of armed conflict as the *lex specialis*. In the event of an apparent inconsistency, the laws of armed conflict will prevail.[11] However, the applicability of the law of armed conflict and international human rights law in armed conflict is a complex question and will depend on the facts of the situation.[12] Australia appears not to regard international human rights law as binding extraterritorially

9 *The US report*, *supra* note 1, at para. 13; For the US position as of December 2011, see: The US Government fourth periodic report to the Human Rights Committee, at paras. 506–507, *available at:* http://ushrnetwork.org/sites/default/files/declaration–treaty/ICCPR_Fourth_Periodic_Report.pdf.

10 *The US report*, *supra* note 1, at para. 13.

11 In addition, human rights norms contained in common Article 3 and Article 75 of the Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977), apply as a matter of treaty or customary law, at least in respect to detention; See: *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces et. al.*, Court File No. T–324–07, Respondent's Factum 83 (Jan. 18, 2008), *available at:* www.bccla.org/antiterrorissue/factumcrown.pdf; Kenneth Watkin, *Use of Force during Occupation: Law Enforcement and Conduct of Hostilities*, 94 (885) IRRC Rev. 267, *fn* 214 (2012).

12 *The Canadian report*, *supra* note 2, at paras. 17–19.

in situations of armed conflict, but will, as a matter of policy, apply human rights standards to the extent that military exigencies permit.[13]

The UK, Germany and the Netherlands are in a somewhat different position. They are subject to a robust regional human rights regime, in the form of the European Convention on Human Rights, and to the jurisdiction of the European Court of Human Rights.[14] The European Court of Human Rights has developed an extensive jurisprudence on when this Convention will apply extraterritorially, including in situations of armed conflict, and this is a significant factor in these States' determinations of when and to what extent human rights obligations will apply in situations of armed conflict.[15]

The Grand Chamber of the European Court of Human Rights has considered the applicability of the Convention to individuals who died in various circumstances in an area in Iraq in which British armed forces were operating, during the period following the end of major combat operations. With the exception of one individual, who had died while in British custody, the UK Government contended that the Court had no jurisdiction over deaths that occurred during combat operations. The Grand Chamber held that the UK armed forces had effective control of the relevant area in the period between the fall of the Ba'ath government and the accession of the Interim Government, and had assumed the exercise of some public powers usually exercised by a sovereign government, including authority and responsibility for the maintenance of security. Accordingly, the UK, through its soldiers engaged in security operations in South East Iraq, exercised authority and control over individuals killed in the course

13 *The Australian report*, *supra* note 2, at para. 22.

14 The US is not a Party to the American Convention on Human Rights or subject to the Inter–American Court of Human Rights. The Inter–American Commission on Human Rights has issued precautionary measures and a resolution calling on the US to close its facility at Guantánamo Bay. The US responded that the Inter–American Commission lacked jurisdiction: *The US report*, *supra* note 1, at para. 14.

15 *The UK report*, *supra* note 2, at paras. 1.29–1.32; *The German report*, *supra* note 2, at paras. 24–28; *The Netherlands report*, *supra* note 2, at para. 79.

of such security operations, such that these individuals were within the jurisdiction of the UK, and the UK was obliged to secure their rights under the Convention (and, most relevantly, obliged to investigate any alleged breach of their right to life).[16]

As with the UK, Germany and the Netherlands treat international human rights law as applicable extraterritorially in situations of armed conflict, insofar as individuals are within their jurisdiction.[17] In Germany, the Federal Ministry of Defence is currently drafting a new internal departmental regulation on the applicability of human rights law in armed conflict. It seems likely that this regulation will confirm the applicability of human rights law, but treat the law of armed conflict as a *lex specialis* in relation to human rights law.[18] The Netherlands applies the European Convention on Human Rights, as a matter of policy, in all situations in which the Netherlands armed forces are deployed on a mission abroad, even where it might not, as a matter of law, be applicable.[19]

International Criminal Law

8. The countries surveyed have all, with the exception of the US, ratified the Rome Statute, and enacted legislation to ensure that they are in a position to investigate and prosecute individuals for the offenses set out in the Rome Statute. In many of these countries, ratification and the desire to ensure that the country is in a position to try its own nationals, should that be necessary, served as a catalyst for amendment and development of legislation setting out offenses of war crimes and other violations of the law of armed conflict.[20]

16 *Al–Skeini* decision, *supra* note 6, at 149; For a discussion of the decision, see: *The UK report*, *supra* note 2, at para. 1.25.

17 *The German report*, *supra* note 2, at para. 25.

18 *Id.*, at para. 26.

19 *The Netherlands report*, *supra* note 2, at para. 15.

20 See: *The Australian report*, *supra* note 2, at para. 4; *The UK report*, *supra* note 2, at para. 1.18; *The Netherlands report*, *supra* note 2, at para. 12; *The German report*, *supra* note 2, at paras. 4–8. In Canada, ratification of the Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, Article

Applicable Domestic Law

9. The countries surveyed differ somewhat as regards the interaction of international law and the domestic legal order. In some cases, treaties, once ratified, become a part of federal law, while in some other systems implementing legislation is required. Regardless of these variations, the central issue for investigation and prosecution (at least of war crimes; more minor violations may be dealt with in other ways) is the existence of domestic criminal offenses. In all cases, the countries surveyed have enacted legislation setting out specific offenses of war crimes (whether or not designated as such), and in most cases, the countries surveyed have enacted provisions dealing with the issue of 'command responsibility', that is, criminal liability for the failure to exercise authority to stop crimes committed by subordinates.

Even in relation to war crimes, the general criminal law and codes of military discipline (rather than offenses pertaining directly to violations of the law of armed conflict) may be relevant, particularly as some countries have a policy of prosecuting conduct by charging alleged offenders serving in their own armed forces with offenses under the general criminal law or military code, rather than with offenses relating specifically to war crimes or violation of the laws of armed conflict. We will now briefly identify the main domestic laws applicable to violations of the law of armed conflict.

28 (1998), prompted changes to arrangements for cooperation between the police and Department of Justice in war crimes investigations; See: *The Canadian report*, *supra* note 2, at para. 16.

Specific Provisions Relating to War Crimes and Violations of the Law of Armed Conflict

10. Some of the countries surveyed have criminalized a wider range of violations of the law of armed conflict than others. In what follows, we note the main classes of offenses that where adopted in each of the countries. It should be noted that the term 'war crimes' is not universally applicable to designate those violations giving rise to criminal liability, and different countries include different offenses as prosecutable crimes.

The US federal criminal code defines 'war crimes' as a confined list of conduct, including grave breaches of the Geneva Conventions of 1949 and any Protocols thereto to which the US is a Party (currently only Additional Protocol III); conduct prohibited by Articles 23, 25, 27, and 28 of the Annex to Hague Convention IV; 'grave breaches of Common Article 3' when committed in the context of an armed conflict not of an international character; and conduct of a person who, in relation to an armed conflict and contrary to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby–Traps and Other Devices (Protocol II to the Convention on Certain Conventional Weapons), willfully kills or causes serious injury to civilians.[21] However, there is uncertainty with respect to the scope of 'war crimes'. Some US Army field manuals state that all violations of the law of armed conflict amount to war crimes, while other material from the Department of Defense and the Navy suggests a distinction between war crimes and a larger class of other violations of the law of armed conflict.[22] Military manuals enumerate some acts additional to those deemed offenses under the criminal code as representative of 'war crimes', including maltreatment

21 War crimes, 18 U.S.C. § 2441(c); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby–Traps and Other Devices (Protocol II), 1342 U.N.T.S. 168; *The US report*, *supra* note 1, at para. 8; note the narrow US definition of 'grave breaches' of Common Article 3.

22 *Id.*, at para. 8.

of dead bodies, misuse of the Red Cross emblem, and compelling prisoners of war to perform prohibited labor.[23]

In Canada, a manual on the law of armed conflict defines war crimes as serious violations of the laws and customs of war.[24] The Crimes Against Humanity and War Crimes Act 2000 defines war crimes as acts or omissions committed during an armed conflict that, at the time and place of commission, constitute war crimes under customary or conventional international law applicable to armed conflicts. An interpretive provision provides that crimes under Articles 6, 7 and 8(2) of the Rome Statute are crimes under customary international law.[25] The Geneva Conventions Act also creates a range of offenses encompassing all grave breaches of the Geneva Conventions and Additional Protocol I.[26]

In Australia, the Criminal Code Act 1995 now contains offenses corresponding to all offenses set out in the Rome Statute.[27] The Australian legislation uses 'war crimes' to refer to a set of offenses that correspond to those in Article 8 of the Rome Statute.

English criminal law includes a number of offenses relevant to the law of armed conflict, such as commission of grave breaches of the Geneva Conventions 1949 or of Additional Protocol I and misuse of protected emblems. In addition, war crimes as set out in Article 8 of the Rome Statute (as well as genocide as set out in Article 6 and crimes of humanity as set out in Article 7) are offenses according to the International Criminal Court Act 2001.[28]

23 *Id.*, at para. 9.

24 *The Canadian report*, *supra* note 2, at para. 9.

25 *Id.*, at para. 10.

26 *Id.*, at para. 11.

27 *The Australian report*, *supra* note 2, at para. 4.

28 *The UK report*, *supra* note 2, at para. 1.14.

In Germany, in drafting relevant provisions of the Code of Crimes against International Law, the legislator sought to incorporate into German law the whole of international customary law regarding war crimes, as well as those codified in Article 8 of the Rome Statute.[29] The provisions of the *Völkerstrafgesetzbuch*, unlike some of the other war crimes provisions surveyed here, make almost no distinction between the laws applicable to international and non–international armed conflict, and do not differentiate between 'grave breaches' and other war crimes, instead structuring provisions around the protection of different interests (persons, property, humanitarian operations, emblems, and so forth).[30]

In the Netherlands, the International Crimes Act[31] contains offenses of grave breaches of the Geneva Conventions of 1949 and of Additional Protocol I, as well as other serious violations of the law of armed conflict relating to both international armed conflict and non–international armed conflict, and other violations of the laws and customs of war. Many offenses under the International Crimes Act correspond to 'war crimes' included in Article 8 of the Rome Statute, even though the term 'war crimes' is not used in the Act,[32] and it also contains other offenses which are not included in the Rome Statute. Examples of such offenses include simple non–aggravated assault on a prisoner of war or detained person without danger of serious injury or amounting to cruel, inhuman or degrading treatment, or the theft of a personal item from such an individual.[33]

11. Besides adopting offenses to criminalize violations of the law of armed conflict, most of the countries surveyed have also enacted provisions dealing with 'command responsibility'. Commanders or those in positions of authority may have some degree of criminal liability in connection

29 *The German report*, *supra* note 2, at para. 111.

30 *Id.*, at para. 110.

31 *Wet Internationale Misdrijven* or WIM.

32 *The Netherlands report*, *supra* note 2, at para. 8.

33 *Id.*

with the acts of their subordinates, as accessories (for example, where the commander or superior aided or abetted the conduct of subordinates[34]) or in their own right (for example, where the commander ordered the offenses or failed to supervise and his conduct constituted dereliction of duty or another like offense[35]). Article 28 of the Rome Statute, however, establishes a distinct ground of criminal responsibility for military commanders and civilian superiors. In general terms, these individuals are liable for a separate offense where two conditions were fulfilled: first, they knew or should have known that subordinates were committing or about to commit crimes within the jurisdiction of the Court (military commanders), or knew or consciously disregarded information which clearly indicated that subordinates were committing or about to commit crimes (political or other superiors); Second, they failed to take all reasonable measures to prevent the crimes or submit matters to competent authorities for investigation and prosecution. Of the countries surveyed, the five that have ratified the Rome Statute have introduced provisions to similar effect into their criminal law, albeit with some variations to accommodate existing law on the alternative grounds for criminal responsibility. One effect of these enactments is to expand the possible grounds for criminal liability of civilians involved in making decisions about the conduct of armed conflict.

In Canada, the relevant provisions create a separate indictable offense that may be committed by commanders and superiors, rather than making them liable for subordinates' crimes. It only applies where commanders know or are negligent in failing to know that subordinates are committing or about to commit relevant offenses.[36] In Australia, the relevant provisions allow for commanders and superiors to be criminally liable for the crimes of subordinates, and also include, as grounds of liability

34 *The UK report*, *supra* note 2, at para. 1.45.

35 *The US report*, *supra* note 1, at para. 21; For an example of charges laid against a commanding officer for negligently failing to perform a duty, see: *The UK report*, *supra* note 2, at para. 1.21, and the charge sheet referred to in *fn* 45.

36 Crimes Against Humanity and War Crimes Act, at Articles 5(1), 7(1) (S.C. 2000, c. 24); *The Canadian report*, *supra* note 2, at para. 31.

for commanders, recklessness as to the commission of relevant offenses.[37] In the UK, the relevant provisions track the text of Article 28 of the Rome Statute almost exactly, but there is a further provision to the effect that a person responsible for an offense under the relevant provisions is regarded as aiding, abetting, counseling or procuring the commission of the offense (i.e., as an accessory).[38] In Germany, according to the Code of Crimes against International Law, a military commander or civilian superior who omits to prevent relevant offenses by subordinates shall be punished in the same way as the perpetrator of the offense. For constitutional reasons, this approach stops short of providing for criminal liability in cases of negligence (although negligence may ground criminal liability for separate offenses of failure to supervise or to report).[39] In the Netherlands, the relevant provisions appear to have a similar effect to Article 28.[40]

In the US, there is no single provision establishing 'command responsibility' as a distinct ground of criminal liability. However, military legal manuals do affirm the existence of criminal liability of this kind, and there is military and civilian case law relying on it.[41]

General Criminal Law, Codes of Military Conduct and Charging Practices

12. In many cases, conduct constituting a violation of the law of armed conflict will also constitute an offense under domestic criminal law (such as murder or assault), or an offense under codes of military conduct (either a specific offense or a general offense of conduct prejudicial to good order and discipline, or something similar).

37 *The Australian report*, *supra* note 2, at para. 33.

38 *The UK report*, *supra* note 2, at para. 1.46.

39 *The German report*, *supra* note 2, at paras. 115–119.

40 *The Netherlands report*, *supra* note 2, at para. 28.

41 *The US report*, *supra* note 1, at paras. 23–25.

With the exception of certain offenses like war crimes, which by their nature are often committed abroad and expressly have an extraterritorial application, most national criminal law usually applies only to conduct committed within the territory of the State. However, in many cases there are provisions extending the application of domestic criminal law to members of the armed forces, even when serving abroad. In those countries with military justice systems, at least some offenses against the domestic criminal law may be tried within the military justice system.

Issues concerning the allocation of responsibility for investigation and subsequent proceedings between the civilian and military justice systems, where relevant, are addressed in section B ('who investigates?'), which deals with the institutions and actors engaged in these matters (paragraphs 19–30). This section ('what to investigate?') focuses on the applicable normative frameworks. It briefly identifies the main statutory codes of military conduct applicable in the countries surveyed, and notes provisions extending the application of the criminal law to members of the armed services deployed abroad. Finally it discusses, for each jurisdiction, the policy and practice regarding when and how to charge individuals serving in the armed forces following incidents that may constitute violations of the law of armed conflict.

United States

13. The US Uniform Code of Military Justice (UCMJ) is a federal statute, applying to various categories of persons, regardless of the nationality of the perpetrator or the territory in which the offense was committed. Such persons include members of the armed forces and reservists on active service, as well as persons accompanying or serving with the armed forces during war or 'contingency operations' such as employees of security agencies or military contractors.[42]

42 Contingency operations are military operations designated by the Secretary of Defense as those in which a participant may become involved in military actions, operations or hostilities, or that result

The UCMJ contains a list of offenses, some of which (such as murder, manslaughter, assault) resemble offenses under domestic criminal law, and some of which (such as absence without leave and disrespect for a superior commissioned officer) could only be committed by a member of the armed forces. Additionally, a general Article incorporates 'crimes and offenses not capital' (along with disorders and neglects to the prejudice of good order and discipline, as well as conduct of a nature to bring discredit on the armed forces) into the jurisdiction of the court martial. This has the effect of bringing violations of the federal criminal code within the military justice system.[43]

The domestic criminal law may be applicable extraterritorially even to those who are not subject to the UCMJ, pursuant to provisions that extend US federal criminal law to various sites overseas ('Special Maritime and Territorial Jurisdiction'). These provisions extend the jurisdiction of federal courts to felony offenses under Special Maritime and Territorial Jurisdiction, where the offenses are committed by civilians accompanying the armed forces, or civilians or contractors supporting the mission of the Department of Defense overseas.[44] Special Maritime and Territorial Jurisdiction has been used, for example, to charge a CIA contractor in connection with the death of a detainee on a military base in Afghanistan.[45]

As to charging practices, US prosecutors tend not to charge members

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in an order preventing active duty service members from separating from service: *Id.*, at para. 78; It seems that the recent amendment to cover civilians accompanying the armed forces on 'contingency operations' was aimed mainly at private security contractors: *Id.*, at para. 78; There may be some doubt about the constitutionality of subjecting civilians to military justice: *Id.*, at para. 54.

43 *Id.*, at para. 19; There has apparently been no instance in which this was used to try offenses under war crimes legislation at court martial.

44 *Id.*, at paras. 17–18.

45 *Id.*, at para. 59; In this case, concerning the fatal beating of a detainee, charges were brought for assault with a dangerous weapon and assault resulting in bodily injury. The accused, David Passaro, was convicted and ultimately sentenced to imprisonment for six years and seven months. It appears that Passaro could also have been charged with war crimes (the War Crimes Act applies to conduct of US nationals anywhere in the world and does not depend on SMTJ provisions).

of the armed forces with offenses relating specifically to war crimes. Military prosecutors are instructed to charge service members with an offense under the general criminal law corresponding to the underlying conduct of the alleged war crime, or a disciplinary offense.[46]

Canada

14. The Canadian *Code of Service Discipline* is contained in Part III of the National Defence Act. The Code applies to members of the Canadian Forces, including reserve forces, but also to civilians who accompany any unit or element of the Canadian Forces on service or active service in certain circumstances (including where they participate in the carrying out of any of the unit or element's movements, manoeuvres, duties in aid of the civil power, duties in a disaster or warlike operation), and to civilians serving with the Canadian Forces who have agreed to be subject to the Code.[47] As with the US UCMJ, the Canadian Code of Service Discipline sets out a number of offenses particular to the armed forces, alongside incorporating offenses against the general criminal law into the set of offenses subject to military jurisdiction. However, the Code of Service Discipline does effectively provide for extraterritorial application of the general criminal law to members of the armed forces, providing that any act taking place outside Canada that would, had it taken place in Canada, be punishable under the Criminal Code or other statute, constitutes an offense under the relevant Division of the National Defence Act.

As in the US, the charging practice in Canada appears to be to prosecute violations of the law of armed conflict by members of the armed forces as general criminal law offenses or military offenses under the Code of Service Discipline, rather than as specific offenses relating to the law of armed conflict.[48]

46 *Id.*, at para. 9.

47 *The Canadian report*, *supra* note 2, at paras. 58, 88.

48 See, e.g., the case of Captain Samrau. Samrau's conduct in shooting an unarmed and wounded

15. The *Defence Force Discipline Act 1982* (DFDA) applies to 'defense members' (members of the permanent or regular forces, or members of the reserves rendering continuous fulltime service, or on duty or in uniform) and 'defense civilians' (persons who, with authority, accompany a part of the Defence Force outside Australia or on operations against the enemy, or who have consented in writing to subject themselves to Defence Force discipline).[49] Consent to Defence Force discipline may be required, for example, when civilians are admitted to certain operational areas.[50]

As with the US and Canada, the Australian DFDA contains a number of offenses particular to the armed forces. As in Canada, the DFDA does effectively provide for extraterritorial application of the general criminal law to members of the armed forces. A defense member or a defense civilian is guilty of an offense under the DFDA if they commit any act which, if committed in a particular Commonwealth territory, would be an offense against the law applicable there, and is liable to the punishment fixed for that offense or, where a range of punishments is available for the offense, punishment that is not more severe than the maximum punishment.[51]

To date, Australia has not prosecuted any members of its armed forces for violations of the law of armed conflict, whether under a specific offense pertaining to the law of armed conflict or the general criminal law.[52]

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insurgent may well have constituted a war crime, but he was charged with second degree murder; attempted murder with a firearm (alternate charge to second degree murder); negligently performing a military duty, and behaving in a disgraceful manner: *Id.*, at *fn* 7, *fn* 12; Annex A. A further example is the case of Captain Gapp. The accused had stolen the headdress of a dead person. He was charged with conduct prejudicial to good order and discipline in respect of a failure to follow a code of conduct prohibiting looting; this charge was stayed and he was ultimately found guilty on an alternate charge relating to failure to comply with theatre standing orders concerning artifacts and trophies of war: *Id.*, at Annex A.

49 *The Australian report*, *supra* note 2, at para. 30.

50 *Id.*, at para. 58.

51 *Id.*, at para. 30.

52 In a recent court martial, charges of manslaughter by criminal negligence were laid against two members of the armed forces, but in that case the Director of Military Prosecutions never alleged

In the event that a violation of the law of armed conflict was investigated and prosecuted, charges could be laid for offenses against the general criminal law (or disciplinary offenses), rather than for offenses against the specific provisions relating to war crimes. This would reflect the common practice in other jurisdictions with military justice systems.[53]

United Kingdom

16. The Armed Forces Act 2006 sets out requirements for persons subject to 'service law' and civilians subject to 'service discipline'. Persons subject to service law include members of the regular forces, and members of the reserve forces in particular circumstances, such as permanent or full–time service, or undertaking any training or duty.[54] Civilians subject to service discipline include Crown servants in designated areas working in support of the armed forces.[55]

The Armed Forces Act specifies a range of offenses, some of which may only be committed by those subject to service law, and some of which (such as looting) may be committed by both persons subject to service law and civilians subject to service discipline. Both persons subject to service law and persons subject to service discipline commit an offense under the Armed Forces Act if they do any act that would, if done in England or Wales, be punishable by the law of England or Wales, thus effectively providing for extraterritorial application of domestic criminal law.[56] The Court Martial has jurisdiction in respect of offenses under the Armed

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that a violation of international humanitarian law had been perpetrated. The Chief Judge Advocate dismissed the charges on the basis that the legal duty of care inherent in the offense of manslaughter by criminal negligence did not exist in a battlefield context: *Id.*, at para. 52.

53 This practice may be motivated by the fact that it is easier for the prosecution to discharge its evidentiary burden without having to establish the existence of a further element, namely, the existence of an armed conflict; and the fact that it may be more difficult to secure a conviction under a specific offense pertaining to violation of the law of armed conflict, because of the stigma attached to 'war crimes'; *Id.*, at para. 13.

54 *The UK report*, *supra* note 2, at paras. 3.13, 3.21–3.22.

55 *Id.*, at para. 3.13.

56 *Id.*, at para. 1.02.

Forces Act. The Service Civilian Court has jurisdiction in respect of minor, non–indictable offenses against the criminal law of England committed by service civilians, but may only exercise this jurisdiction outside the territory of England.[57]

In the UK, one prosecution has been brought against a member of the armed forces on a charge of 'inhuman treatment' under domestic legislation incorporating offenses set out in the Rome Statute.[58] The charge related to the fatal beating of a detainee (Baha Mousa, whose case was one of six at issue in the House of Lords case *R (Al–Skeini) v. Secretary of State for Defence*,[59] and also the subject of a public inquiry). The individual pleaded guilty and was sentenced to 12 months' imprisonment, reduction in rank and dismissal from the armed forces.[60]

Germany

17. Members of the armed forces and certain civilian actors, mainly civilians within the chain of command, are subject to the Code of Law for Members of the Armed Forces,[61] the Code of Crimes Committed by Members of the Armed Forces,[62] and the Military Discipline Regulation.[63] However, these do not contain criminal offenses pertaining to violations of the law of armed conflict.[64] Criminal offenses relating to violations of the law of armed conflict are provided in the generally applicable law: the Code of Crimes against International Law (which applies extraterritorially) and, insofar as the general criminal law does not contradict this statute, the general

57 *Id.*, at para. 3.22.

58 *Id.*, at para. 1.21.

59 *R (Al–Skeini) v. Secretary of State for Defence* [2007] UKHL 26. This case was also referred to the Grand Chamber of the European Court of Human Rights, See: *Al–Skeini* decision, *supra* note 6. See also: Chapter A, para. 53.

60 However, other members of the armed forces charged in relation to this episode had charges against them dropped, or were acquitted.

61 *Soldatengesetz* or SG.

62 *Wehrstrafgesetzbuch* or WStG.

63 *Wehrdisziplinarordnung* or WDO.

64 *The German report*, *supra* note 2, at para. 18.

criminal law (which may apply extraterritorially in certain circumstances).[65]

In Germany there have been investigations of members of the German armed forces for violations of the law of armed conflict, but none resulted in indictment.[66]

Netherlands

18. In the Netherlands, members of the armed forces and certain categories of civilians, including those designated by the Crown as performing vital functions within the Netherlands Armed Forces, are subject to a Military Criminal Code containing criminal offenses for those subject to it,[67] as well as a Military Discipline Justice Act[68] that sets out less serious disciplinary infractions which are not criminal offenses.

The Military Criminal Code provides that members of the armed forces are subject to all criminal legislation in force in the Netherlands even while serving abroad.[69] Although offenses are prosecuted in a designated court forming part of the civilian justice system, the penalty of military detention is available to persons subject to military law, and may take the place of imprisonment (though not for sentences longer than six months).[70]

The Netherlands does not appear to have ever prosecuted any members of its armed forces for conduct relating to violations of the law of armed conflict, although there have been a number of investigations. It has been noted that there may be justifications for charging less serious violations of the law of armed conflict as offenses under the Military

65 *Id.*, at paras. 16–18; 128–132.

66 *Id.*, at paras. 133–147.

67 *Wetboek van Militair Strafrecht* or MSr; *The Netherlands report*, *supra* note 2, at paras. 58–59.

68 *Wet Militair Tuchtrecht* or WMT.

69 *The Netherlands report*, *supra* note 2, at paras. 26, 57.

70 *Id.*, at para. 60.

Criminal Code, rather than as offenses specifically pertaining to violation of the law of armed conflict under the International Crimes Act.[71]

71 *Id.*, at the responses to questions.

B. The Mechanisms that Examine and Investigate Complaints and Claims of Violations of the Laws of Armed Conflict ('Who Investigates?')

19. As noted, the countries surveyed have different political, legal and institutional structures, and differences in these structures have a bearing on the way in which potential violations of the law of armed conflict are investigated and prosecuted. This section gives, for each of the countries, an overview of the different institutions and personnel involved in investigation and subsequent proceedings relating to violations of the law of armed conflict. In light of the fact that countries which have a distinct system of military justice tend to investigate and prosecute violations of the law of armed conflict through military justice mechanisms (see above paragraphs 13–15), the overview of institutions in these countries will focus on their military justice systems. The emphasis will be on institutions other than the relevant operational chain of command, although, as will be seen, commanders play an important role in some countries.

We will first present the relationship between the civilian and military justice systems in the countries surveyed, and following that we will discuss each of the countries separately.

Relationship Between Civilian and Military Justice Systems

20. The US, Canada, Australia and the UK have systems of military justice that operate in parallel to the system of civilian justice and are capable of investigating and prosecuting criminal offenses without reliance on the civilian justice system (although there may be some overlap in the personnel serving in the two systems, such as, in the UK, civilian judges serving as Judge Advocates in the Court Martial). In Germany and the

Netherlands, there is no distinct military justice system. Criminal violations of the law of armed conflict are prosecuted and judged within the civilian court system (though in the Netherlands, there is still a distinct military chamber designated to hear cases in which the accused are members of the armed forces).[72] However, there remains a disciplinary system internal to the armed forces, and, even for criminal matters that will ultimately be prosecuted in civilian courts, the military police play a major role in investigations of suspected violations.[73]

As noted above, in some cases, conduct may constitute a specific criminal offense relating to violation of the law of armed conflict, an offense against the general criminal law, and/or a military offense under an applicable code of military discipline, giving rise to a range of avenues for investigation and, where necessary, prosecution. In those countries which have a distinct military justice system, military and civilian authorities may thus have concurrent jurisdiction, and a preliminary issue will be whether investigation and prosecution is pursued through military or civilian channels. Generally, it seems that possible violations of the law of armed conflict committed by serving members of the armed forces outside the territory of these countries are most likely to be investigated and, if necessary, prosecuted, through the military justice system. Once there has been a conviction or acquittal in a military justice proceeding, the civilian courts would usually no longer have jurisdiction to prosecute in respect of the same conduct.[74]

72 *Id.*, at paras. 52–53.

73 *The German report*, *supra* note 2, at paras. 44–46; *The Netherlands report*, *supra* note 2, at paras. 46–49.

74 In the US, where particular conduct is subject to trial by court martial, it may not, under the double jeopardy clause of the Constitution, be tried again in a federal criminal proceeding: Grafton v. United States, 206 U.S. 333 (1907); *The US report*, *supra* note 1, responses to questions. In Canada, a finding of guilty or not guilty by a service tribunal bars any subsequent proceeding in a civil court for the same conduct (and vice versa): *The Canadian report*, *supra* note 2, at para. 5. In Australia, individual decisions of general courts martial are reviewable, at least on a question of law, by the Defence Force Discipline Appeal Tribunal, the Federal Court of Australia, and ultimately (with leave) the High Court of Australia. In the UK, a conviction or acquittal for an offense under the general criminal law, tried in the military system, bars subsequent prosecution for that offense in the civilian courts. However, where new and compelling evidence comes to light, there may be a retrial even following acquittal in either military or civilian proceedings, provided it is in the public interest: *The UK report*,

In the US, Memoranda of Understanding between the Department of Justice and the Department of Defense provide that, in most cases, prosecutions for federal crimes (including war crimes) by a serving member of the armed forces will be pursued through the military justice system, and investigations of crimes on military installations or by serving members of the armed forces will usually be conducted by military authorities rather than civilian authorities.[75]

In Canada, there are no formal arrangements in place concerning the exercise of jurisdiction by military or civilian officials. The circumstances and location of the relevant incident, the interests of military discipline, and whether military or civilian agencies have the better resources to accomplish the task will determine whether the investigation proceeds in the military or civilian systems. Existing authority suggests that violations of the law of armed conflict by members of the Canadian Forces will be prosecuted in the military justice system.[76]

In Australia the Director of Military Prosecutions (DMP) signed a Memorandum of Understanding (MoU) with all nine Australian Directors of Public Prosecutions (DsPP) (Federal, State and Territory) which states that the DMP will consult the relevant DPP where the DMP is of the view that, while the alleged conduct is a breach of service discipline, it may also constitute an offense which should be dealt with by the civilian justice system. It is understood that to date the DMP has not referred any serious service offenses to a DPP pursuant to the MoU.[77]

In the UK, in cases of an alleged violation of the law of armed conflict by a member of the armed forces, the practice has been to exercise Service jurisdiction and, where applicable, lay charges to be tried by Court

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supra note 2, at para. 1.09.

75 *The US report*, *supra* note 1, at paras. 5, 19, 94–96.

76 *The Canadian report*, *supra* note 2, at para. 6.

77 *The Australian report*, *supra* note 2, at para. 5.

Martial.[78] In one instance in which (prior to the Armed Forces Act 2006) a commander dismissed charges, barring prosecution in the military justice system, the case was referred to the Attorney–General, and proceedings were commenced in the civilian justice system.[79]

United States

Military Justice System

21. The main institutions of the military justice system are 'military criminal investigative organizations' (MCIOs) and military police, the Judge Advocate–General Corps of each service, courts martial and appellate courts.

(1) *MCIOs*, namely the US Army Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations, carry out investigations of serious offenses.[80] MCIO personnel are generally drawn from regular service ranks, with advanced educational qualifications, and often with policing experience. Although they are members of the armed forces, MCIOs have separate reporting chains, usually to the Chief of Staff and Secretary of the relevant service.[81] Operational commanders may not interfere with investigations initiated by MCIOs, nor do MCIOs require outside command approval to investigate. Commanders can request that MCIOs initiate such an investigation, but MCIO commanders are not bound by such requests.[82]

(2) *Provost marshals and military police* at US military installations may also be involved in investigations. Provost marshals are frequently members of commanders' staffs and they, and military police investigators,

78 *The UK report*, *supra* note 2, at para. 1.08.

79 *Id.*, at para. 1.07.

80 *The US report*, *supra* note 1, at para. 65.

81 *Id.*

82 *Id.*

are considered assets at the disposal of the installation or commander to which they are assigned.[83]

(3) *The Judge Advocate–General* (*JAG*) of each service has authority and functions set out in statute, and typically reports to the relevant service Chief of Staff.[84] The Judge Advocates–General may also be subject to technical supervision by the civilian General Counsel of their service.[85] There are statutory provisions aimed at ensuring the independence of JAGs and members of the JAG Corps in their provision of advice.[86] The JAGs of each service are responsible for providing advice and legal services, including in relation to the law of armed conflict, to the armed forces, and they typically do so through field offices led by Staff Judge Advocates. Although the JAG corps is the primary source of legal advice for each service, lawyers within the Department of Defense or, more rarely, the Department of Justice, may also provide advice supplementing or even superseding that of the JAG corps.[87] Similarly, although the vast majority of interpretation of the law of armed conflict for the executive branch is done by the JAG corps, the Department of State may also have a role, and the Department of Justice is the final arbiter of the legal position taken within the executive branch.[88]

83 *Id.*, at para. 91.

84 The term Chief of Staff here refers to a position (i.e., heads of the services), and not to a function.

85 *Id.*, at paras. 84, 86.

86 Provisions prohibit officers or employees of the Department of Defense from interfering with the ability of the JAG to give independent legal advice to the Secretary or the Chief of Staff of the relevant service, or from interfering with the ability of judge advocates to give independent legal advice to commanders: 10 USC § 3037(e) (Army); 10 USC § 5148(4)(e) (Navy); 10 USC § 5046(c) (Marine Corps); 10 USC § 8037(f) (Air Force). These were introduced following tensions between civilian attorneys and the JAG Corps regarding the treatment of detainees. The signing statement accompanying the statute which inserted these provisions states that they shall be interpreted by the executive branch so as to be consistent with, among other things, the statutory grant to the Secretary of Defense of authority, direction, and control over the Department of Defense, the statutory authority of the Attorney–General and the general counsel of the Department of Defense as its chief legal officer to render legal opinions that bind all civilian and military attorneys within the Department of Defense: Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Oct. 28, 2005), in Weekly Compilation of Presidential Documents 2673 (Nov. 1, 2004).

87 *The US report*, *supra* note 1, at para. 85.

88 *Id.*

The JAGs of each service are also responsible for the supervision and administration of military justice in their service.[89] Beneath them are distinct hierarchies for trial judges and defense counsel (for example, the Army JAG appoints a Chief Trial Judge, responsible for supervision and administration of the Army trial judiciary, and a Chief of Trial Defense, who supervises and controls trial and appellate defense counsel).[90]

Although in the US system commanders retain a major role in courts martial processes, including referral of charges, the JAG corps of each service are also involved in both courts martial themselves and, in some cases, the 'pre–trial investigations' required to inquire into the truth of the charges and gather information to assist the commander's disposition of the case. Pre–trial investigations will be carried out by investigating officers, usually of the grade of Major or higher, appointed by a court martial convening authority, and lawyers from the JAG corps may be involved in more serious cases.[91]

(4) *Courts martial* are presided over by Judge Advocates drawn, along with prosecutors and defense counsel, from the JAG corps. Judge Advocates are assigned exclusively to judicial duties for the period of their appointment and they fall outside the operational chain of command for that period. Military judges do not have tenure as such, and they may be reassigned to operational legal duties following a period of service as a judge.[92] A 'panel' of members of the armed forces sits as the equivalent of a jury. Members of the panel are to exercise independent judgment, and there is a statutory prohibition on using panel members' participation in a court martial in a subsequent evaluation or efficiency report.[93] The entire court martial process is subject to a prohibition of 'unlawful command

89 *Id.*, at para. 84.
90 *Id.*, at para. 73.
91 *Id.*, at para. 68.
92 *Id.*, at para. 89.
93 *Id.*

influence', namely improper use of authority that interferes (or gives the appearance of interfering) with the military justice process.[94]

(5) *The Court of Criminal Appeals for the Armed Forces* (*CAAF*) (consisting of civilian judges appointed for 15 year terms by the President of the United States) reviews all cases in which the convicted individual was sentenced to death. Decisions of the CAAF are subject to review by the Supreme Court on a writ of certiorari.[95]

Civilian Justice System

22. As noted above, the US civilian justice system will only rarely be involved in investigation and prosecution of violations of the law of armed conflict by serving members of the armed forces. However, there have been several instances of prosecution in the civilian justice system, concerning individuals who had been discharged prior to their offenses coming to light.[96] If the civilian justice system is engaged, cases concerning violations of the law of armed conflict are likely to come within federal jurisdiction and proceed through federal, rather than state, agencies and courts.[97] The main institutions of the federal civilian justice system are the Federal Bureau of Investigation (FBI),[98] the Attorney–General and US Attorneys,[99] and the federal court hierarchy.[100]

94 *Id.*, at paras. 87–88; In a recent case, charges of failure to accurately report and investigate alleged murders committed by Marines in Iraq were dismissed on the basis that a military lawyer's involvement in both investigation of the incident, and later in advising on charges to the convening authority, tainted the proceedings: *Id.*, at paras. 88, 112(a).

95 *Id.*, at para. 93; A final mechanism is the Presidential pardon power.

96 For example, the case of former Marine Jose Luis Nazario Jr, indicted on charges of voluntary manslaughter for the killing of four unnamed civilians in Fallujah, Iraq, in November 2004, but ultimately acquitted; and the case of former soldier Steven Green, convicted of rape, conspiracy and multiple charges of murder in respect of the rape of a young girl and the murder of the girl and her family in Mahmoudiya, Iraq, in March 2006: see *Id.*, at paras. 56–57.

97 *Id.*, at paras. 29–31.

98 *Id.*, at paras. 37, 97.

99 *Id.*, at paras. 39, 40–47.

100 *Id.*, at paras. 49–50.

CANADA

Military Justice System

23. The main institutions of the military justice system are the Canadian Forces Military Police and their special investigative branch, the Canadian Forces National Investigation Service, the Judge Advocate–General, the Director of Military Prosecutions, the Director of Defence Counsel Services, courts martial and appellate courts.

(1) *The Canadian Forces Military Police and Canadian Forces Provost Marshal* that heads them have powers set out in statute. Internal policy states that military police investigations shall not be influenced by the chain of command, and a letter from the Chief of Defence Staff states that, effective 1 April 2011, the Canadian Forces Provost Marshal is to have full command of all military police who are directly involved in policing. This letter is one result of a recent investigation by the Military Police Complaints Commission that made findings regarding the need for structural and other reforms of the military police.[101]

(2) *The Canadian Forces National Investigation Service (CFNIS)* is the branch of the Canadian Forces Military Police that deals with more serious and complex investigations. The CFNIS is under a commanding officer who reports directly to the Canadian Forces Provost Marshal, in order to protect the ability of CFNIS to conduct investigations independently of any command influence.[102] Additionally, all military police are subject to a Military Police Code of Conduct and a professional standards organization, as well as the oversight of the Military Police Complaints Commission (MPCC). The MPCC is an independent civilian body with quasi–judicial status, established to provide greater public accountability by military

101 *The Canadian report*, *supra* note 2, at para. 101.

102 *Id.*, at paras. 102, 106.

police and the chain of command in relation to military police investigations. Among other things, it plays a role in maintaining military police independence. Any member of the military police who believes a member of the Canadian Forces or a senior official of the Department of National Defence has interfered with or attempted to influence a military police investigation may file a complaint with the Commission.[103] Additionally, complaints about the adequacy of military police investigations may be brought to the Professional Standards directorate of the Military Police, or the MPCC. While the CFNIS is not subject to the control of the Director of Military Prosecutions (DMP) or the Judge Advocate–General, the DMP may request, in the exercise of his duties in an individual case, that the CFNIS carry out additional investigations.[104]

(3) *The Judge Advocate–General (JAG)* is responsive to the chain of command for the provision of legal services, but responsible to the Minister of National Defence for performance of his duties.[105] The JAG has duties set out in statute. These include serving as the legal adviser to the Governor–General, the Minister of National Defence, the Department of National Defence, and the Canadian Forces on matters relating to military law, and superintending the administration of the military justice systems in the Canadian Forces.[106] The JAG is a source of legal advice concerning the law of armed conflict for the Government of Canada as a whole, and will be consulted on matters concerning law of armed conflict, but alongside legal advisers from the Department of Justice and the Department of Foreign Affairs and International Trade. The powers exercised by the JAG as a legal advisor are not in derogation of the authority of the Minister of Justice and the Attorney–General of Canada.[107]

103 *Id.*, at paras. 104–105.

104 *Id.*, at para. 106.

105 *Id.*, at para. 97.

106 *Id.*, at para. 90.

107 *Id.*; National Defence Act, at Article 10(2).

(4) *The Director of Military Prosecutions (DMP)* is appointed by the Minister of National Defence for a term of four years, renewable, and is a barrister or advocate of at least ten years' standing. The duties of the DMP are set out in statute and include referring all charges for trial by court martial, conducting prosecutions at court martial, and representing the Minister on criminal appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada.[108] In addition to these statutory duties, the DMP provides legal advice in relation to criminal and disciplinary investigations undertaken by the Canadian Forces National Investigation Service.[109] The DMP acts under the general supervision of the JAG. However, this relationship, like the relationship between the Federal Director of Public Prosecutions and the Attorney–General, is subject to certain safeguards aimed to ensure the DMP's independence, both in common law and in the institutional structures established by statute. For example, while the JAG may issue to the DMP instructions and guidelines in relation to a particular prosecution or prosecutions in general, for example, the JAG must give a copy of such instructions to the Minister of National Defence, and the DMP must ensure that such instructions are made public (except where the DMP decides that such release to the public would not be in the best interests of the administration of military justice).[110]

(5) *The Director of Defence Counsel Services (DDCS),* like the DMP, is appointed by the Minister of National Defence for a renewable term of four years, and is a barrister or advocate of at least ten years' standing. The DDCS' duties include providing, supervising and directing provision of legal services to accused persons. Legal officers assigned to Defence Counsel Services represent clients in accordance with DDCS and JAG policies and professional codes of conduct pertaining to all lawyers. Communications between accused and legal officers of Defence Counsel Services are protected by solicitor–client privilege. The DDCS is statutorily

108 *Id.*, at para. 92.

109 *Id.*

110 *Id.*, at para. 98.

independent from other Canadian Forces and Department of National Defence authorities. While the DDCS acts under the general supervision of the JAG, the JAG may only issue instructions or guidelines of a general kind, rather than in respect of particular defenses or courts martial. The DDCS must make these instructions and guidelines public.[111]

(6) *Military justice procedures* include summary trials and courts martial. Summary trials are held in the unit, by unit authorities. For summary trials and minor offenses an accused is provided with an assisting officer, to assist the accused in preparation for the case, and during the trial. Offenses against the Crimes Against Humanity and War Crimes Act, Geneva Conventions Act and most general criminal law offenses triable in the military justice system must be tried at court martial.[112]

Courts martial are convened by a Court Martial Administrator from the Office of the Chief Military Judge. There are two types of court martial: General and Standing. General Courts Martial, convened for serious offenses punishable by imprisonment for life,[113] comprise a military judge from the Office of the Chief Military Judge, and a panel of Canadian Forces members sitting as the equivalent of a jury. Standing Courts Martial comprise a military judge sitting alone.[114] In either case the prosecutor will be from the office of the DMP, and defense counsel is provided by Defence Counsel Services or, at the accused's expense, from among civilian lawyers.[115]

(7) Courts martial decisions are subject to *appellate review*, first in the Court Martial Appeal Court (CMAC), and then, on a question of law if

111 *Id.*, at paras. 93, 99.

112 *Id.*, at para. 79; For the vast majority of service offenses, the accused may also elect to be tried at court martial rather than by summary trial.

113 Or by choice of the accused, providing the offense in question is punishable at least by imprisonment for two years.

114 *Id.*, at para. 86.

115 *Id.*, at para. 84.

a judge of the CMAC dissents or if the Supreme Court gives leave, to the Supreme Court of Canada.[116]

Civilian Justice System

24. As in the US, the civilian justice system in Canada will rarely be involved in the investigation and prosecution of violations of the law of armed conflict by serving members of the armed forces. If the civilian justice system is engaged, the main institutions are the Royal Canadian Mounted Police,[117] the Attorney–General,[118] the Director of Public Prosecutions,[119] and the courts.[120]

AUSTRALIA

Military Justice System

25. The main institutions of the military justice system are the Australian Defence Force Investigative Service (ADFIS), the Judge Advocate–General, the Director of Military Prosecutions, courts martial and appellate courts, and the Australian Defence Force Legal Services. The Inspector–General of the Australian Defence Force also plays a role in military justice.

(1) *ADFIS* is responsible to the Chief of the Defence Force, and headed by a Provost Marshal, appointed by the Chief of the Defence Force for a fixed term. ADFIS operates outside the immediate chain of command. In relation to the conduct of its investigations, ADFIS acts independently and not under the command of unit or local military commanders, although they may be advised by the Legal Officer posted to ADFIS to amend an

116 *Id.*, at para. 112.
117 *Id.*, at paras. 1, 38–39, 49–52.
118 *Id.*, at paras. 40, 44–45, 55.
119 *Id.*, at paras. 46, 48.
120 *Id.*, at para. 41.

investigation report in which more evidence is required, and they may also be requested by the Director of Military Prosecutions to seek further evidence.[121]

(2) *The Judge Advocate–General (JAG)* is appointed by the Governor–General for a fixed term of office. Although holding the rank of two stars the JAG stands outside the military chain of command, and reports to the Minister of Defence. The holder of the office must be a judge of the Federal Court or a State Supreme Court. The JAG may be a Defence member, and the current (2011) and previous JAGs have been two–star General ranking officers of the Reserve Forces.[122] The functions and powers of the JAG are set out in statute and include the making of procedural rules for service tribunals, participating in the appointment of Judge Advocates, Defence Force Magistrates, Presidents and members of courts martial, and reporting on the operation of various laws relating to discipline in the ADF. The JAG does not have command or administrative responsibility for legal officers. The JAG has general oversight of the operation of the military justice system but does not review decisions of courts martial or Defence Force magistrates (other than in situations in which the Chief of the Defence Force or a service chief undertakes a further review of a service tribunal proceeding and requires a legal report[123]). The JAG does not have any relationship with investigators or any role in prosecution. Nor does the JAG function as a legal adviser to either the ADF or the Government, as

that would be inconsistent with judicial office. This function is performed by the Director–General of ADF Legal Services.[124]

(3) *The Director of Military Prosecutions (DMP)* is appointed by the Minister of Defence for a fixed term, at the rank of Brigadier–General.

121 *The Australian report*, *supra* note 2, at para. 51.

122 *Id.*, at para. 60.

123 *Id.*

124 *Id.*, at para. 62.

The DMP stands outside the military chain of command, and reports to the Minister of Defence. The DMP enjoys statutory independence and it is a criminal offense to interfere with the DMP in relation to a decision to prosecute. The DMP is a statutory office and its functions include carrying on prosecutions for service offenses in proceedings before a court martial or Defence Force magistrate, and representing the service chiefs in proceedings before the Defence Force Discipline Appeal Tribunal.[125]

(4) *Trials of 'service offenses' take place before a 'service tribunal'.* There are three kinds of 'service tribunal': a summary authority, a Defence Force magistrate, and a court martial. Summary authorities (a class of officers within the chain of command) may only deal with less serious offenses.[126] Defence Force magistrates and courts martial deal with the more serious offenses.

(5) There is an automatic review of all convictions by service tribunals, and penalties imposed must be approved by a reviewing authority within the chain of command. Convictions in courts martial or before a Defence Force magistrate may also be appealed to the Defence Force Discipline Appeal Tribunal on a question of law (or, with leave, a question of fact). The Tribunal members are judges of the Federal Court, and the Tribunal President is the current JAG. Questions of law arising in Tribunal proceedings may be referred, and appeals from the Tribunal on questions of law may be made, to the Federal Court of Australia.

(6) *Military legal services* are organized under the Director–General of ADF Legal Services (DGADFLS). The DGADFLS acts as the principal legal adviser in the areas of military administrative law, military operations law (including law of armed conflict) and military discipline

125 *Id.*, at para. 61.

126 For example, they cannot try any criminal offense for which a person is liable to more than two years imprisonment.

law. Under the DGADFLS are, *inter alia*, the Directorate of Operations and International Law (the advisory branch) and the Directorate of Military Justice Reform.[127]

(7) Finally it is important to note *the office of the Inspector–General of the ADF (IGADF)*. IGADF is intended to provide the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system, independent of the ordinary chain of command, and with an avenue by which failures and flaws in the military justice system can be exposed and examined so that causes of injustice (systemic or otherwise) can be remedied. The duties of the IGADF include inquiring into matters concerning the military justice system; conducting performance reviews of the system, including internal audits, as the IGADF considers appropriate; advising on matters concerning the military justice system, including making recommendations for improvements; and promoting military justice values across the ADF. The IGADF may initiate inquiries on his own motion, or be requested to do so by the Chief of the Defence Force, a service chief or any other individual. The IGADF has adopted a practice of conducting random audits of military justice practices, procedures, processes, training and competencies in ADF units and, while it investigates such matters as abuse of authority and lack of procedural fairness, the IGADF may also look into instances of cover–up or failure to act.[128]

Civilian Justice System

26. As in the other countries with military justice systems, the civilian justice system in Australia will rarely be involved in the investigation and prosecution of violations of the law of armed conflict by serving members of the armed forces. If the civilian justice system was engaged, the main

127 *Id.*, at para. 62.

128 *Id.*, at para. 66.

institutions would be the Australian Federal Police,[129] the Director of Public Prosecutions,[130] and the courts.[131]

UNITED KINGDOM

Military Justice System

27. The main institutions of the military justice system are the service police (in practice, usually the Royal Military Police), the Director of Service Prosecutions, the Judge Advocate–General, Courts Martial and appellate courts, and the legal branches of each service.

(1) Each of the three services has a *military police force* (the Royal Military Police, Royal Air Force Police, and Royal Navy Police). Most allegations of violations of the law of armed conflict to date have involved Army soldiers, so the Royal Military Police have played the most significant role in these investigations.[132] The governance structure for each force is similar. Each Service police force is headed by a Provost Marshal outside the operational chain of command; the Army Provost Marshal is responsible to the Army Board of the Defence Council (comprising senior officials from the Ministry of Defence and Government ministers). Service police are subject to discipline by the relevant Provost Marshal and not the operational chain of command, and are required by the Queen's Regulations to investigate independently of the chain of command.[133] Since 2011, the Provost Marshals are appointed by the Queen rather than the Minister of Defence, and will have a duty to seek to ensure that all investigations carried out by the force are free from improper interference, namely an attempt by a person who is

129 *Id.*, at para. 35.
130 *Id.*, at para. 36.
131 *Id.*
132 *The UK report*, *supra* note 2, at para. 3.05.
133 *Id.*, at paras. 3.46–3.47.

not a service policeman to direct an investigation that is being carried out.[134] The Service police are subject to inspection by Her Majesty's Inspectorate of Constabulary (HMIC) to ensure standards, and since 2011, the HMIC will report to the Secretary of State on the independence and effectiveness of investigations carried out by the service police.[135]

Each of the Services has a legal branch, the head of which is part of the chain of command, but subject to an 'invisible wall' dividing their role as an officer in the chain of command from their professional obligations as a lawyer.[136] The Service legal branches are the primary source of advice to the armed forces on law of armed conflict. Generally, the Service legal branches will not be a primary source of advice to the government; the Government has civilian lawyers in the Ministry of Defence and Foreign and Commonwealth Office to provide it (via the Attorney–General) with advice.[137]

(2) *The Director of Service Prosecutions (DSP)*, who may be a civilian, heads the Service Prosecution Authority (SPA). He is appointed by the Queen,[138] and is responsible for the decision whether to lay charges in a particular case. The staff of the SPA are members of one of the Service legal branches but, in their prosecution duties, are responsible to the DSP.[139] The SPA, like civilian prosecutorial authorities, is subject to inspection by the Queen's Crown Prosecution Inspectorate. The Attorney–General has, through custom and practice, taken on a supervisory role in relation to the military legal system, and this appears likely to continue to apply in relation to the new office of DSP (pursuant to the Armed Forces Bill 2011). Additionally, the Attorney–General is answerable to Parliament for the

134 *Id.*, at paras. 3.20, 3.44.
135 *Id.*
136 *Id.*, at para. 3.29.
137 *Id.*, at paras. 2.06, 3.31.
138 *Id.*, at paras. 3.19, 3.32.
139 *Id.*, at para. 3.47.

SPA, both in relation to its work generally and in relation to particular cases,[140] and must also give his consent for the prosecution of any person, whether a member of the armed forces or a civilian, for offenses under the International Criminal Court Act.[141] The Attorney–General has stepped in to activate civilian criminal proceedings in one case in which a commanding officer dismissed charges against a serviceman, which at the time precluded the exercise of military jurisdiction, but in the usual course of events the Attorney–General will not be involved in military prosecutions.[142]

(3) *The Judge Advocate–General (JAG)* is responsible for the Judge Advocates who act as judges in proceedings before Courts Martial. All are civilians, and are not part of the Service legal branches. The advice of a Judge Advocate is confined to matters appertaining to trial by the Court Martial.[143]

(4) *The Court Martial* comprises a Judge Advocate as the judicial officer, together with a panel of Service officers and warrant officers (between three and seven, depending on the case) sitting as the equivalent of a jury.[144] Decisions of the Court Martial may be appealed to the Court Martial Appeal Court.[145]

(5) There is also a process for *summary hearings before commanding officers* for less serious offenses, and where the individual concerned holds a middle to junior rank.[146] The accused is not legally represented. However, the accused may elect for the trial to be held before a Court Martial rather

140 *Id.*, at paras. 3.34, 3.36.
141 *Id.*, at para. 3.19.
142 *Id.*, at paras. 2.05, 1.07.
143 *Id.*, at para. 3.33.
144 *Id.*, at para. 3.17.
145 *Id.*, at para. 3.50.
146 *Id.*, at para. 3.18.

than in the summary forum. Decisions reached in summary proceedings may be appealed to the Summary Appeal Court.[147]

Civilian Justice System

28. In the event that the civilian justice system is engaged in suspected violations of the laws of armed conflict, the main institutions are the relevant civilian police force,[148] the Director of Public Prosecutions[149] and the courts.[150]

GERMANY

Civilian Justice System

29. The civilian justice system is the only system for criminal prosecution of violations of the laws of armed conflict in Germany, but, at least insofar as offenses are committed outside Germany, the military police are likely to play the main role in investigation.[151] Serious disciplinary (rather than criminal) violations are adjudged in tribunals within the Ministry of Defence.

Violations of the law of armed conflict will be handled by federal authorities, while other criminal matters are generally handled by the states (*Länder*).[152] The main institutions involved in investigation and prosecution of violations of the law of armed conflict are the military police; in some cases, the civilian federal police;[153] the Federal Prosecutor–

147 *Id.*, at para. 3.50.
148 *Id.*, at paras. 2.03, 3.08, 2.10.
149 *Id.*, at paras. 2.04, 2.12.
150 *Id.*, at paras. 2.01–2.02.
151 *The German report*, *supra* note 2, at paras. 44–46.
152 *Id.*, at paras. 37–40.
153 *Bundeskriminalamt* or BKA.

General;[154] and the courts. For other criminal offenses, institutions of the *Länder* will play a role.

(1) *The military police* are a special branch of the German military, with independence and their own chain of command. Members of the military police are specially trained for policing work.[155]

(2) *The civilian federal police* may be requested to assist the Federal Prosecutor–General, for example, in the investigation of a violation of the law of armed conflict under the Code of Crimes against International Law. If requested to do so, they must assist, although they will often face difficulties in operating overseas.[156]

(3) *The Federal Prosecutor–General* reports to the federal Minister for Justice. Although the Minister can issue orders to the Prosecutor–General, the Minister must comply with all laws and regulations. Prosecutorial independence is secured by a principle of mandatory prosecution, except in the case of exemptions set out in law.[157]

(4) As regards other criminal matters, there is an *Attorney–General* for each of the 24 higher regional court districts in Germany. The Attorneys–General are organs of the state. They each have an Office of the Prosecutor supporting them. The allocation of jurisdiction among these Attorneys–General is complex but they have agreed between them that the Office of the Prosecutor in Potsdam will refer matters involving crimes committed abroad by or against the German armed forces, to either the Office of the Prosecutor in the district of

154 *Generalbundesanwalt* or GBA.

155 *The German report*, *supra* note 2, at para. 46.

156 *Id.*, at para. 44.

157 *Id.*, at paras. 42–43; 61; 72–73.

the last post of the accused in Germany, or to the Federal Prosecutor–General.[158]

The higher regional courts[159] have jurisdiction in relation to offenses under the Code of Crimes against International Law.[160]

(5) Serious disciplinary (not criminal) offenses may be heard before a *Truppendienstgericht*. This is a tribunal established within the Ministry of Defence, involving a civilian lawyer as a presiding judge and soldiers who were chosen by their respective military commanders and the administration of the courts to serve in proceedings as associate judges. In these proceedings, military lawyers serve as indicting authorities.[161]

In Germany, civilian lawyers within the Ministry of Defence provide advice to the Ministry and to the military on the law of armed conflict and other matters. Other departments are advised by their own lawyers. In relation to provision of advice on law of armed conflict to the government, lawyers from the Foreign Office play an important role, alongside lawyers from the Ministry of Defence, and any legal position developed in the Ministry of Defence must be cleared with the Foreign Office.[162]

NETHERLANDS

Civilian Justice System

30. As in Germany, the civilian justice system is the only system for

158 *Id.*, at para. 14.

159 *Oberlandsgerichte.*

160 *The German report*, *supra* note 2, at paras. 36, 84.

161 *Id.*, at para. 53; Appendix V.

162 *Id.*, at para. 52.

criminal prosecution of violations of the laws of armed conflict, but, at least insofar as offenses are committed outside the Netherlands, the military police are likely to play the main role in investigation.

The main institutions involved in investigation and prosecution of violations of the law of armed conflict are the National Police Corps[163] and the National Investigation Service,[164] the Royal Military Constabulary,[165] the National Prosecutorial Authority,[166] the District Prosecutor of Arnhem[167] and the District Court in The Hague and Arnhem, and the Military Legal Service of the Armed Forces.

(1) *The National Police Corps* falls under the Ministry of Security and Justice, and under the general instruction of the Public Prosecution Service in matters relating to the investigation of criminal offenses (specifically, under the direction of the branch of the Public Prosecution Service dealing with particular offenses). The National Investigation Service is a branch of the National Police Corps charged with investigating offenses including those against the International Crimes Act. It includes a special team of investigators and advisers charged with investigating suspected offenses of an international character, including offenses under the International Crimes Act. The National Investigation Service is under the direction of the National Prosecutorial Authority.[168]

(2) *The Royal Military Constabulary* is a branch of the armed forces charged with the investigation of all offenses under military law. In all matters relating to the investigation of possible criminal offenses they act under the instructions and responsibility of the Chief Prosecutor in the

163 *Korps Landelijke Politiediensten.*

164 *Dienst Nationale Recherche.*

165 *Koninklijke Marechaussee* or KMar.

166 *Landelijk Parket.*

167 *Hoofdofficier van Justitie.*

168 *The Netherlands report*, *supra* note 2, at paras. 2, 33.

District of Arnhem (see below), rather than the military authorities or the Department of Defence.[169] However, where the Royal Military Constabulary are carrying out investigations in the context of a military mission, there can be a certain degree of dependence on the operational commander for communications, logistical support and force protection, as well as military expertise in areas such as mine and explosive clearance.[170]

(3) *The National Prosecutorial Authority* is a part of the Public Prosecution Service,[171] the organ charged with investigation and prosecution of all offenses under Dutch criminal law.[172] The Public Prosecution Service falls within the Ministry of Security and Justice. It is organized along territorial and functional lines. Within the Public Prosecution Service, the National Prosecutorial Authority is responsible for the investigation and prosecution of certain offenses including organized national and transboundary crime, terrorism, violations of the law of armed conflict and in particular offenses against the International Crimes Act, which implements the Rome Statute.[173]

(4) *The District Prosecutor of the Court in Arnhem* deals with offenses committed by members of the armed forces (including offenses under the International Crimes Act), and the investigation and prosecution of criminal offenses is allocated to the Military Affairs Section of the District Office in Arnhem.[174] The District Prosecutors are under the supervision of the College of Procurers–General discussed in further detail below. The Military Affairs Section consists of civilian prosecutors and supporting staff, a liaison officer from the Royal Military Constabulary, and two liaison officers from the military legal service of the armed forces.[175] The

169 *Id.*, at para. 63.

170 *Id.*, at para. 64.

171 *Openbaar Ministerie* or OM.

172 *The Netherlands report*, *supra* note 2, at para. 1.

173 *Id.*

174 *Id.*, at paras. 3, 52–54.

175 *Id.*, at para. 53.

Military Affairs Section also draws on the advisory services of an Expertise Centre for Military Criminal Law.[176] In practice, the investigation of a possible violation of the law of armed conflict by a serving member of the armed forces would be conducted with close cooperation between the District Prosecutor in Arnhem and the National Prosecutorial Authority.[177]

On appeal, military criminal matters are handled by the Advocate–General[178] for the relevant Appeals District, effectively the prosecutor at the appellate level. The Advocate–General and his staff are all civilians.[179]

There is no equivalent in the Netherlands to the Attorney–General in other systems, namely an office with ultimate responsibility for both provision of legal advice, and oversight of law enforcement and prosecution. Prosecutorial oversight rests with the College of Procurers–General,[180] a body of three to five senior prosecutorial magistrates. The College establishes general guidelines for prosecutorial policy and can issue instructions and general directives to Chief Prosecutors of each District, which are published in the Official Gazette, although prosecutors have a large degree of autonomy in day to day decision–making.[181] The College does have a statutory power to intervene in matters of national importance and ensure that a suspected violation is investigated and brought to trial, if the College takes the view that the prosecutor responsible for investigating the violation in question was not sufficiently diligent in pursuing the investigation.[182] The portfolio for military affairs is handled by the Chairman of the College.[183]

176 *Id.*, at para. 54.
177 *Id.*, at paras. 3, 52.
178 *Advocaat–general.*
179 *The Netherlands report*, *supra* note 2, at para. 54.
180 *College van procureurs generaal.*
181 *The Netherlands report*, *supra* note 2, at paras. 34, 76.
182 *Id.*, at para. 34.
183 *Id.*, at para. 55.

Although the armed forces have no direct involvement in investigation and prosecution, there are various means by which concerns or issues specific to the armed forces may be raised with prosecutors. Military authorities who believe that the interests of the armed forces have not received sufficient attention in the context of a criminal investigation may offer advice to the Public Prosecution Service. The Ministry of Defence may also provide advice. In practice there are various forms of consultation between the Ministry of Defence and the Public Prosecution Service, enabling the former to advise the Public Prosecution Service on matters relating to the armed forces, and specific operations, and discussion of matters relating to prosecutorial policy. It is for the Public Prosecution Service to decide what to do with any advice received.[184]

(5) There are 19 District Courts competent in the first instance to deal with all criminal matters involving felony offenses (which would include breaches of the law of armed conflict).[185] The District Court in The Hague is designated as the court of first instance for the trial of persons under the International Crimes Act.[186] The District Court in Arnhem has a Military Chamber with jurisdiction over all offenses committed by members of the armed forces, including offenses as laid down in the International Crimes Act.[187] Two of the three judges, including the President, are civilians, and the remaining judge is drawn from the legal service of the branch of the armed forces of which the accused is a member.[188] The tenure of the military judge is for periods of

184 *Id.*, at para. 56.

185 *Id.*, at para. 32.

186 *Id.*, at para. 2.

187 *Id.*, at para. 52; There are limited exceptions to this: when an offense is committed in an area subject to the Commander of the Caribbean Area, in which case the matter will be within the jurisdiction of a District Court in the Antilles; and where an offense is committed by more than one person, and one or more of the other persons involved is a civilian, in which case the matter will proceed before a court other than the Military Chamber.

188 *Id.*, at para. 53.

four years, and may be extended.[189] For minor matters conducted before a single judge, the judge is a civilian.[190]

Appeals from the Military Chamber are to the Military Chamber of the Arnhem Court of Appeals, also consisting of two civilian judges and one military judge. Further appeals, on points of law only, may be made to the (civilian) Supreme Court.[191]

Courts of Appeal also have jurisdiction in respect of complaints (by a person or organization that has a direct interest in the matter) that the Public Prosecution Service has erred in not bringing a particular matter to trial. When deciding on such a complaint, the Court of Appeal will review the evidence and hear both the plaintiff and the Public Prosecution Service to determine whether there are grounds for an order to open or continue investigation. The Courts of Appeal may order further investigation in such a case, or order that a matter be brought to trial.[192]

(6) *The Military Legal Service of the Armed Forces*[193] comprises some 130 lawyers, all of whom have received postgraduate training in relevant areas of law and completed a specialized programme in military law.[194] The service provides advice to operational commanders in all relevant areas of law, including the law of armed conflict. Military legal advisers are responsible to operational commanders and functionally directed by the military legal adviser at the next highest level in the chain of command.[195] They have no role in investigation or prosecution of suspected criminal

189 *Id.*, at the responses to questions.

190 *Id.*, at para. 53.

191 *Id.*

192 *Id.*, at paras. 30, 36, 68.

193 *Militair Juridische Dienst Krijgsmacht* or MJDK.

194 *The Netherlands report*, *supra* note 2, at para. 98.

195 *Id.*, at para. 62.

offenses.[196] Members of the Military Legal Service may, however, sit as judges in the Military Chamber in the District Court of Arnhem.[197]

Advice to the government on matters relating to the law of armed conflict may come from various agencies including the Directorate of Legal Affairs of the Ministry of Defence (which is largely a civilian body but has among its staff a varying number of military lawyers who are part of the Military Legal Service, including the Head of the Military Legal Service who holds the rank of Brigadier–General, and is the third person in the hierarchy of the Directorate); the Ministry of Foreign Affairs; the Netherlands Red Cross, universities and research institutes.[198]

196 *Id.*, at para. 61; The two military liaison officers assigned to the District Prosecutor in Arnhem serve on detachment, and do not form part of the Public Prosecution Service.

197 *Id.*, at para. 3.

198 *Id.*, at the responses to questions.

C. Processes of Investigation and Subsequent Proceedings ('When and How to Investigate?')

31. This section sets out the law and practice in each of the countries surveyed regarding when and how to investigate possible violations of the law of armed conflict by members of the armed forces. For each country, there is a discussion of 'when to investigate?' (the circumstances calling for reporting and initiation of investigations of different kinds), and 'how to investigate?' (who undertakes the different kinds of investigation, and what these investigations involve). The discussion of 'how to investigate?' is divided into routine processes, which are applied in every instance, and *ad hoc* mechanisms, such as public inquiries, which are initiated occasionally, and to subsequent proceedings.

United States

When to Report and Investigate: Routine Processes

32. One of the central reporting regimes relates to 'reportable incidents', namely a 'possible, suspected or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict'.[199] All military and US civilian employees, contractors and subcontractors assigned to or accompanying the armed forces, are required to report any 'reportable incident' through the chain of command. Reports may also be made through other channels, including the military police, a judge advocate, or an inspector–general, which must all forward any report received through their chain of command.[200] Higher authorities have reporting responsibilities to a range of military and civilian officials.[201] The US Army has additional reporting requirements

199 *The US report*, *supra* note 1, at para. 106.

200 *Id.*, at para. 103.

201 *Id.*, at para. 100.

for 'war crimes' such as mistreatment of enemy prisoners of war, detainees, displaced persons, retained persons or civilian internees; violations of the Geneva Conventions; and atrocities. War crimes are categorized as 'category 1 serious incidents' and require reports, with copies for commanders and legal advisors at each level, to be submitted to Headquarters, Department of the Army.[202]

The US Army Special Assistant for Law of War Matters advises military lawyers that the reporting process is designed to be over–inclusive and that, when in doubt, they should report.[203]

Reportable incidents give rise to obligations to investigate (either through administrative or criminal systems). There are also obligations to investigate arising in circumstances that may not reach the threshold of a reportable incident; for example, where there has been a suspected offense against the UCMJ. Taken together, the different regimes appear to impose the obligations set out below. Importantly, these obligations need not be fulfilled sequentially – if the circumstances are such that US personnel may be involved in or responsible for a reportable incident, the commander is required to inform the relevant military criminal investigation organisation (MCIO) and commence a formal command investigation immediately; he need not do a 'preliminary inquiry' first.

1. If a commander receives information:

    a. of a suspected offense against the UCMJ committed by command personnel; and/or

    b. information about a 'reportable incident' that is alleged to have been committed by command personnel (including civilians,

202 *Id.*, at para. 102.

203 *Id.*, at para. 101.

contractors and subcontractors assigned to or accompanying the force);

The commander is required to conduct a *preliminary inquiry*.[204] In the case of information about a reportable incident, the preliminary inquiry should determine whether US personnel may be involved in or responsible for a reportable incident.[205]

2. If US personnel (i.e., command personnel, civilians, contractors or subcontractors) may be involved in or responsible for a reportable incident the commander must both initiate a formal investigation by command investigation in accordance with Service regulations, and at the same time notify the relevant MCIO (which will then determine whether to conduct a criminal investigation).[206] If not already reported, the incident should be reported as required (see above).[207]

3. If it does not appear that the conduct is sufficiently serious to qualify as a reportable incident, inquiries might still proceed through the MCIO or the military police if they are particularly complex (the level of complexity or technical sophistication required for the investigation determining which of the two is the most appropriate);[208] otherwise, they may be pursued through administrative investigation, and lead to administrative penalties or non–judicial punishment.

In addition to these general directives and instructions, there may be stricter theatre–specific orders on the initiation of particular kinds of investigations. One example would be the orders reported to have been given by the Deputy Commander of US forces in Iraq in 2006, requiring

204 *Id.*, at paras. 64, 105.
205 *Id.*, at para. 105.
206 *Id.*
207 *Id.*, at para. 106.
208 *Id.*, at para. 129.

investigations of any use of force against Iraqis that resulted in death, injury, or property damage greater than 10,000 US Dollar.[209]

A Department of Defense directive states that it is Department policy that on–scene commanders ensure that measures are taken to preserve evidence of reportable incidents pending transfer to appropriate authorities. This presumably applies, at the latest, from the point at which a commander has determined that US personnel have been involved in a reportable incident (which, to recall, includes a 'possible, suspected or alleged violation of the law of war, for which there is credible information'). There are no publicly available guidelines giving further detail on how preservation of evidence should be achieved in a conflict context. Recent reviews of military operations have emphasized the need for better practices in this regard (although this has been motivated largely by a desire to facilitate prosecution of insurgents, rather than investigation of US personnel).[210]

How to Investigate: Routine Processes

33. It follows from the foregoing that a number of different types of investigation may be relevant:

1. Operational reviews are conducted after nearly every operation.

2. Administrative investigations are generally preliminary investigations that gather information and can result in either administrative consequences or criminal investigations.

    a. A 'preliminary inquiry' required under the DoD Implementation of Law of War Program to determine whether US personnel may be involved in or responsible for

209 *Id.*, at para. 108.

210 *Id.*, at paras. 136–137.

a reportable incident, and/or required under the UCMJ;

b. A 'formal investigation by command investigation', to be undertaken if US personnel may be involved in or responsible for a reportable incident (but which will only continue insofar as it does not hinder any investigation commenced by an MCIO);

3. Criminal investigations are MCIO investigations.

4. 'Pre–trial investigations' under the Rules of Court Martial precede all charges referred to a general court martial, including war crimes.

We will now discuss these types of investigations in order.

1. Operational Reviews

34. Routine operational reviews, called 'operational debriefings', 'hot washes', or 'after action reviews' (AARs), are conducted after nearly every military operation to capture tactical, technical and operational lessons. AARs are distinct from the criminal and administrative investigations considered here, although statements made or information collected during AARs may trigger the reporting of an incident or may form the basis for initiating either criminal or administrative investigations. Statements or information given in the course of AARs are not protected by any form of immunity (as may be the case in some safety investigations).[211]

211 *Id.*, at para. 125.

2. Administrative Investigations

35. Administrative investigations are common for minor or technical breaches, for example, incidents involving losses or destruction of property.[212] They are often used to gather information for preliminary decisions on criminal charging or administrative corrective measures.[213] All military leaders are empowered to prescribe retraining or corrective processes related to such deficiencies in conduct. Commanders may also initiate more formal administrative procedures resulting in reassignment, changes in duties, or reduction in rank of lower enlisted persons. Administrative corrective measures promote good order and discipline and include 'counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges'.[214] Often, administrative measures, such as suspension from eligibility for promotion, are imposed before criminal proceedings are resolved.[215] Accordingly, concurrent administrative and criminal investigations into the same incident or activity are not precluded but criminal investigations by MCIOs enjoy primacy over administrative investigations when conflicts arise.[216] Preliminary inquiries and formal command investigation are sub–categories of administrative investigations which we will now discuss.

2.A. 'Preliminary Inquiry'

36. There is no definitive guidance regarding the conduct of a 'preliminary inquiry' to determine whether US personnel may be involved in or responsible for a reportable incident. It is typically very informal and

212 *Id.*, at paras. 62, 70.

213 *Id.*, at paras. 70, 79.

214 *Id.*, at para. 79.

215 *Id.*, at para. 63; Though administrative penalties are more often imposed only following the conclusion of criminal proceedings: *Id.*, at para. 135.

216 *Id.*, at paras. 104–105, 107, 134.

conducted by the commander personally or by a member of the command.[217] The form taken by such an inquiry is likely to depend on the personnel and assets available to undertake it. A preliminary inquiry will usually be undertaken by a single, low–ranking officer, working alone, and the scope of the inquiry will usually be limited to the unit members and the unit's area of operations. The inquiry would not be expected to detract significantly from the investigating officer's other duties, indicating that, if a significant time commitment or expertise were required, the inquiry would probably be closed with a recommendation for further investigation.[218]

The current Special Assistant to the Judge Advocate–General for Law of War Matters has stated that a preliminary inquiry may take the form of the preliminary inquiry required for a suspected offense against the UCMJ, or an informal administrative investigation.[219] The Manual for Courts–Martial (MCM) provides that the preliminary inquiry for a suspected offense against the UCMJ should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation. While preliminary inquiries are usually carried out by the commander or command personnel, the MCM indicates that, in serious or complex cases, the commander should consider whether to seek the assistance of law enforcement personnel. The effect of this is that preliminary inquiries by commanders alone will be reserved for the simplest violations.[220]

An informal administrative investigation may also be used to gather additional information about an alleged incident. Pursuant to regulations applicable to the Army,[221] an appointing authority (usually a battalion

217 *Id.*, at para. 64.

218 *Id.*, at paras. 126–128.

219 See: Dick Jackson, *Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War*, 11(6) THE ARMY LAWYER 95, 99 (2010) [hereinafter: *Jackson, Reporting and Investigation*]; *The US report*, *supra* note 1, at para. 127.

220 *The US report*, *supra* note 1, at para. 64.

221 Army Regulation 15–6: Procedures for Investigating Officers and Boards of Officers (Oct. 2, 2006).

commander or higher) will appoint an officer uninvolved in the incident to conduct the inquiry, sort out facts, and make a recommendation to the commander regarding steps to be taken. The procedures would allow for expedited evidence gathering, and consideration of sworn statements and routine reports.[222]

If it is clear that a matter requires criminal investigation, because of its gravity or complexity, the preliminary inquiries may be simple and quick.[223] As mentioned above, if it is apparent that US personnel may be involved in or responsible for a reportable incident, commanders are obliged to notify the MCIO and initiate a formal investigation.

2.B. 'Formal Investigation by Command Investigation'

37. The procedures for a formal investigation are based in service–specific regulations. Formal investigations are initiated by a commander in accordance with these regulations and at the same time the commander notifies the MCIO who is responsible for subsequent criminal incident reporting.[224] One example of a formal investigation is the procedure for 'Formal Boards of Officers' in the Army. The Board of Officers procedure is intended to ascertain facts and make recommendations. Individuals subject to a Board of Officers are entitled to be represented by counsel, and the Board itself may have a legal adviser as a non–voting member to advise it in relation to evidentiary, legal or procedural matters.[225]

These formal investigations may occur in parallel with MCIO investigations, but (as detailed below), MCIO investigations take precedence.[226]

222 See: *Jackson, Reporting and Investigation*, *supra* note 219; *The US report*, *supra* note 1, at para. 127.
223 *The US report*, *supra* note 1, at para. 132.
224 *Id.*, at para. 105.
225 *Id.*
226 *Id.*

Self–incriminating statements made to administrative investigators, or evidence traceable to such statements, may not be introduced in subsequent court martial proceedings. Notwithstanding this doctrine, regulations instruct administrative investigators to issue warnings regarding the right not to answer questions where there is a suspicion of a criminal offense.[227]

3. Criminal Investigation – MCIO Investigation

38. Once it has received a report of a 'reportable incident', the MCIO has authority to determine whether to investigate. Although there are extensive arrangements to protect the independence of the MCIOs in determining whether or not to investigate, there do not appear to be any precise criteria on which decisions to open an investigation are made (or at least, none that are publicly available).[228]

The MCIO's decision to investigate a possible 'reportable incident', may be a result of a notification or request from a commander, the request of the Department of Defense Inspector–General, or on its own initiative. Investigations by the MCIO have primacy over any other investigations conducted by commanders, safety investigators, and other organizational entities, and such investigations shall not interfere or otherwise hinder criminal investigations. If a commander objects to the initiation of an MCIO investigation, he may report this up the chain of command to the Secretary of the relevant service. Only the Secretary (and, for investigations requested by the Inspector–General, only the Inspector–General) may order delay, suspension or termination of an investigation.[229]

Once investigations have commenced, MCIOs are required under policies and regulations to coordinate with theater level commander and

227 *Id.*, at para. 134.

228 *Id.*, at paras. 65, 130.

229 *Id.*, at para. 65.

staff, the theater Provost Marshal, and the relevant US Embassy.[230]

Upon the conclusion of a MCIO investigation, the MCIO provides the results of the investigation to commanders, and commanders are then responsible for determining whether to initiate administrative actions, or military discipline procedures through court martial. Commanders retain significant discretion in decisions about charging.[231] Although in practice they will usually consult a staff judge advocate, they are only required to do so if a charge is referred for trial by a general court martial.[232]

4. Pre–Trial Investigation

39. If charges are pursued through a court martial (whether following criminal investigation by the MCIO, or administrative or command investigation), it must be preceded by a pre–trial investigation. This is governed by the Rules for Court Martial (RCM). The 'pre–trial investigation' aims to inquire into the truth of the charges and gather information to assist the commander's disposition of the case. These investigations resemble trials to some extent, in that they involve witnesses, and the accused may have legal counsel and be present for witness testimony. Pre–trial investigations may use evidence or statements gathered in the process of an MCIO investigation, although the pre–trial investigation remains a distinct process.[233] At the end of the investigation the investigating officers will make a recommendation on each charge, although this is not binding on the court martial convening authority.[234] The convening authority then has discretion regarding whether to refer charges to court martial.

230 *Id.*, at para. 66.

231 *Id.*, at para. 67.

232 Rules for Court–Martial, Rule 406; *The US report*, *supra* note 1, at the responses to questions.

233 *The US report*, *supra* note 1, at para. 133.

234 *Id.*, at para. 68.

Occasional and Ad Hoc Investigative Mechanisms

40. The US Congress may, as part of its oversight of the executive branch, inquire into matters including potential violations of the law of armed conflict. This oversight is undertaken primarily by the committee system. The Senate Committee on Armed Services has, for example, undertaken a detailed inquiry into allegations of abuse of detainees in US custody.[235] Detainee policy also remains on the agenda of the House Committee on Armed Services.[236]

In the US, public and criminal inquiries may be handled concurrently. Although it is possible that Congressional inquiries could give rise to allegations of unlawful command influence, or tainting of panel pools, in the hearings dealing with My Lai and events at Abu Ghraib, neither case posed significant barriers to criminal prosecution.[237]

Proceedings Following Investigation

41. There are three broad categories of measures that may be taken in the event of a violation of the law of armed conflict. More serious violations are most likely to be dealt with in court martial proceedings, with military or criminal sanctions if proceedings result in a conviction and the commander approves the sentence imposed.[238] Commanders may also impose administrative corrective measures (including such measures as reprimands, extra instruction, and administrative withholding of privileges) and 'non–judicial punishment' (varying in accordance with the rank of those imposing the discipline and subject to it, but including measures such as reduction in pay and extra duty).[239]

235 *Id.*, at paras. 15, 52.
236 *Id.*, at para. 52.
237 *Id.*, at para. 53.
238 *Id.*, at para. 62.
239 *Id.*, at paras. 79–81.

Some of the general characteristics of a court martial proceeding have been described above (in paragraphs 19–30). Following completion of a court martial, commanders, as court martial convening authorities, review records of trial, hear matters in mitigation submitted by the accused, and take action on the findings and sentence. This action can only operate to the benefit of the accused: the commander may not impose findings of guilt where such findings have not been made by the court martial, nor impose a heavier sentence, but may disapprove findings of guilt or reduce, suspend or vacate sentences. Guidance in the Manual for Courts–Martial indicates that action following court martial is taken in 'the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons'.[240] In making decisions about action following court martial the commander is exercising a command prerogative, and has sole discretion. However, the Manual for Courts–Martial requires that, prior to taking any such decisions, the commander receive advice and a recommendation from a Staff Judge Advocate (SJA) or other legal adviser (not involved in the original court martial proceedings), and take into consideration the result of the trial, the recommendation of the SJA or legal officer, and material submitted by the accused in mitigation.[241] The Judge Advocate–General of each service also reviews court martial proceedings, but this review is directed to ensuring that convictions have a basis in law, and that sentences are appropriate.[242]

If a commander does not refer charges to a court martial, the commander may still impose a range of administrative punishments, of which 'non–judicial punishment' is more serious. Non–judicial punishment (NJP) may be imposed by commanders for 'minor offenses' under the punitive articles of the UCMJ. The categorization of an offense as 'minor' depends on matters such as the nature and circumstances of the offense, the offender's age, rank, duty assignment, record and experience, and the

240 *Id.*, at para. 75.

241 Rules for Court–Martial, Rule 1107(b)(3); *The US report*, *supra* note 1, at para. 75.

242 *The US report*, *supra* note 1, at para. 84.

maximum sentence that would apply to the offense if it were charged at court martial. Usually, offenses carrying a maximum sentence of less than a year would be considered minor.[243]

CANADA

When to Report and Investigate: Routine Processes

42. There are various reporting requirements that may be relevant to a possible violation of the law of armed conflict (as well as other offenses).[244]

The Queen's Regulations and Orders (QRO) require that officers and non–commissioned members report to the 'proper authority' (presumably, including the chain of command or police) any infringement of relevant statutes, regulations, rules, orders and instructions governing the conduct of a person subject to the Code of Service Discipline. For officers, this applies only when the officer cannot 'deal adequately with the matter' (likely to be the case for possible violations of the law of armed conflict). For a violation of the law of armed conflict, the proper authority would normally be the military police or CFNIS.[245]

Rule 11 of the Code of Conduct for Canadian Forces Personnel requires any breach of the law of armed conflict to be reported, whether to superiors in the chain of command, the military police, a chaplain, legal officer or any other person in authority.[246]

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243 *Id.*, at para. 80.

244 In addition to the existence of criminal offenses for failure to report war crimes, it is an indictable offense under the Crimes Against Humanity and War Crimes Act for a military commander or superior to fail to take, as soon as practicable, necessary and reasonable measures within their power to submit, inter alia, alleged commission of war crimes within the meaning of that statute to the competent authorities for investigation and prosecution: *The Canadian report*, *supra* note 2, at para. 116.

245 *Id.*, at para. 108.

246 *Id.*, at para. 115.

Additionally, there may be theatre–specific orders on reporting. One such order, Joint Task Force Afghanistan Standing Order 304 requires that any 'significant incident' (including 'actions by [Canadian Forces] members that may undermine public values, or lead to the discredit of Canada at home or abroad') must be reported immediately.[247]

These reporting requirements appear to be triggered when war crimes have been committed (for example, Crimes Against Humanity and War Crimes Act); when laws or rules have been breached (QRO; Code of Conduct for Canadian Personnel); or when an action that may undermine public values or lead to the discredit of Canada has occurred (Standing Order 304). Notwithstanding this, there are no reporting obligations that directly address whether to report a possible or merely suspected breach, particularly one of a law of armed conflict violation. Much therefore turns on the circumstances in which investigations are required.

The Queen's Regulations and Orders require that an investigation shall be conducted as soon as practical when a complaint is made or when there are other reasons to believe that a service offense[248] may have been committed.[249] A provision to the effect that a frivolous or vexatious complaint need not be investigated suggests that, if there are grounds beyond the frivolous or vexatious, there should be an investigation.

Although this does not appear to be recorded formally, it has been the 'invariable practice' in Afghanistan and many other theatres of operation that Canadian commanders order an investigation of some kind, whether administrative or criminal, in all cases of death or injury, including collateral death or injury, and even including deaths of enemy combatants.[250]

247 *Id.*, at para. 117.

248 An offense under the National Defence Act (including the Code of Service Discipline), the Criminal Code or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline.

249 *The Canadian report*, *supra* note 2, at para. 122.

250 *Id.*, at para. 125.

At least in Afghanistan, the practice has been followed regardless of the intensity of hostilities.[251] The CFNIS mandate to investigate serious and sensitive matters means that they are the investigatory body, at least until a determination can be made that no criminal/disciplinary culpability exists.[252] Property damage, on the other hand, is not always investigated, particularly if the facts are clear or the damage is slight.[253]

There has also been some discussion of the duty to investigate applying to the military police, in the context of an investigation by the Military Police Complaints Commission into allegations that, among other things, military police failed to investigate injuries to a small group of detainees, due to over–hasty processing at Kandahar Airfield. The Military Police Complaints Commission investigation found that there had been a failure to investigate injuries inflicted on one of the detainees.[254] The Commission concluded that there was no intention to cover–up the injuries but rather the military police succumbed to the pressure from the chain of command for the maximum haste of the transfer of detainees generally. The Commission recommended that consideration be given to further enhance the independence of the military police. This recommendation was accepted by the Provost Marshal and a new military police command and control structure was subsequently put in place by the Chief of Defence Staff.[255]

251 *Id.*, at the responses to questions.

252 *Id.*, at para. 125.

253 *Id.*, at para. 126.

254 See: *Id.*, at para. 135(c).

255 See: Military Police Complaints Commission, *Afghanistan Public Interest Investigation*, *available at:* www.mpcc–cppm.gc.ca/300/afghanistan/index–eng.aspx.

How to Investigate: Routine Processes

43. There are two types of investigation that are relevant, 'administrative' and 'disciplinary' investigations, each of which has some variations. Possible violations of the law of armed conflict are most likely to give rise to disciplinary investigations. A 'disciplinary' offense under the Canadian Codes of Service is fundamentally part of a criminal law system.

As noted above, there is also a practice of having CFNIS conduct initial investigations in all cases of death or injury, at least until it can be confirmed that there is no disciplinary/criminal liability. These investigations, while involving CFNIS, would presumably not be full disciplinary investigations in the form discussed below, and are thus considered separately here. There is, however, no specific requirement that mandates an investigation into such cases.

Administrative Investigations

44. Investigations conducted by commanders at all levels for the effective and efficient administration of their units are generally categorized as administrative investigations.[256] There is no single definition of an 'administrative' investigation, and there are three possible avenues: informal investigations, summary investigations, and boards of inquiry.

1. Informal investigations have no specific authority or methodology. Such investigations are premised on residual command authority vested in those who command units or elements of the Canadian Forces, and permit a commanding officer to maintain situational awareness until

256 *The Canadian report*, *supra* note 2, at para. 66.

he is able to determine the appropriate course of action.[257]

2. Summary investigations are authorized in the Queen's Regulations and Orders. They have fixed terms of reference.[258]

3. Boards of Inquiry are authorized in statute, for the purpose of investigating and reporting on any matter connected with the government, discipline, administration or functions of the Canadian Forces or affecting any officer or non–commissioned member on which it is expedient that the Minister of National Defence, the Chief of Defence Staff, or officers in the command, be informed. For example, there have been several boards of inquiry convened to investigate the treatment and transfer of detainees in Afghanistan.[259] Boards of Inquiry have fixed terms of reference.[260]

Importantly, under Defence Administrative Orders and Directives (DAOD), neither a summary investigation nor a board of inquiry may be convened if the sole or primary purpose is to obtain evidence for a disciplinary purpose or assign criminal responsibility.[261] One reason for this is that compelled evidence would not be admissible in a disciplinary proceeding.[262] These two types of investigations (administrative and disciplinary) are clearly distinct. If an administrative investigation or board of inquiry receives evidence that it reasonably believes relates to an allegation of a criminal act or a disciplinary offense, the investigators must stop the investigation and seek the assistance of the unit legal adviser, in order to avoid posing difficulties for subsequent disciplinary or criminal investigations. A DAOD prescribes the inclusion of a paragraph to this effect in the terms of reference of boards of inquiry.[263]

257 *Id.*, at para. 67.
258 *Id.*
259 *Id.*, at para. 27.
260 *Id.*
261 *Id.*, at paras. 26, 68, 120, 124.
262 *Id.*, at paras. 26, 124.
263 *Id.*, at para. 124.

Routine Investigations in Cases of Civilian Death

45. As indicated above, in cases of civilian death during armed conflict CFNIS has the initial mandate to conduct an investigation, and pursue the investigation at least until it can be determined that there is no criminal or disciplinary culpability involved.[264] If there is a suspicion of such culpability, the investigation will be a disciplinary investigation.

Investigations by CFNIS of cases of civilian death serve a different purpose and are conducted as totally separate processes from any operational debriefings or internal processes that focus on whether the operation was optimally conducted.[265]

Disciplinary Investigations

46. 'Disciplinary investigations' are investigations which, as noted above, are to determine whether a service offense (violation of any law, including the Code of Service Discipline contained in the National Defence Act) has been committed. The purpose of investigating a service offense is to reconstruct events, gather evidence, identify elements of the alleged offense and also identify those responsible.[266] A disciplinary investigation must, at minimum, collect all reasonably available evidence bearing on the guilt or innocence of the individual concerned.[267]

Disciplinary investigations may be carried out by CFNIS, the civilian police, base or wing military police, or, in the cases of minor breaches of discipline, unit authorities. CFNIS will usually undertake investigations of serious or sensitive offenses. These are offenses which, by the nature of the allegation, or through those who are or may be implicated, could

264 *Id.*, at para. 125.
265 *Id.*, at para. 127.
266 *Id.*, at para. 61.
267 *Id.*

have a strategic impact. CFNIS is thus most likely to be responsible for investigating violations of the law of armed conflict.[268] For non–serious or non–sensitive cases, or cases in which CFNIS has waived jurisdiction, the regular military police (or possibly civilian police) will conduct the investigation. Unit investigations will usually only be used for minor breaches of discipline.

Occasional and Ad Hoc Investigative Mechanisms

47. The Canadian House of Commons and Senate have both standing committees and special committees, appointed to undertake specific inquiries. For example, the Special Committee on the Canadian Mission in Afghanistan held hearings on, among other things, the transfer of detainees to the custody of Afghan officials, but so far there has been no report on the issue.[269]

The government may order a public inquiry into important events and issues. There is legislation establishing the manner in which such inquiries may be called, their powers and responsibilities. A public inquiry might be undertaken in order to investigate a possible violation of the law of armed conflict of particular concern. The closest example of an inquiry of this kind is the Commission of Inquiry into the Deployment of the Canadian Forces in Somalia (1994–1997). This Commission investigated various events that occurred during the mission, including the alleged torture and murder of a Somali prisoner by Canadian Forces personnel.[270]

The Military Police Complaints Commission (MPCC) is empowered to conduct an investigation into a complaint and hold hearings, if the

268 *Id.*, at para. 62.

269 *Id.*, at paras. 22, 143.

270 *Id.*, at para. 24; The final report was highly critical of senior military and civilian personnel, and of existing systems of military justice, and resulted in the disbanding of the Canadian Airborne Regiment.

Chairperson considers an investigation is advisable in the public interest. A public interest investigation was held in response to complaints concerning alleged abuse of Afghan detainees in the custody of Military Police.

There is no legal prohibition on holding a parliamentary or public inquiry concurrently with a criminal investigation, although doing so may compromise the capacity to conduct the criminal investigation and proceed with a prosecution, if appropriate. The government must make such choices when deciding whether to initiate a public inquiry, and setting the terms of any such inquiry. However, in some circumstances it is possible to manage concurrent inquiries without jeopardizing potential criminal proceedings. The MPCC investigation into the treatment of Afghan detainees provides an example. Given that an investigation into the handling of detainees was being undertaken by the CFNIS at the same time, and given the risk that witnesses or evidence might be compromised inadvertently by the MPCC investigation, the MPCC and the CFNIS agreed on a protocol whereby CFNIS provided to the MPCC copies of documents the CFNIS had obtained (subject to the MPCC holding these documents in confidence), and the MPCC waited to interview witnesses until the CFNIS had concluded its investigation, or given consent to particular interviews.[271]

Proceedings Following Investigation

48. Charges may be laid by members of CFNIS and by unit authorities (commanding officers, and officers and non–commissioned members authorized by a commanding officer). In the event that an investigation is conducted by base or wing military police, the case is referred to the unit for the laying of charges.[272]

The authorities empowered to lay charges have discretion as to

271 *Id.*, at para. 57.

272 *Id.*, at para. 74.

whether to do so, but in general, charges should be laid unless there are some legitimate and compelling public interest reasons why jurisdiction ought not be exercised in a particular case. The authorities will normally be in the best position to assess public interest reasons and, in particular, what the interests of unit discipline require. Notwithstanding their discretion, the authorities are still required to obtain legal advice before laying most charges (i.e., for all charges where a court martial election must be offered).

Once laid, charges must be referred to the commanding officer of the accused; the commanding officer of the base, unit or element in which the accused is present at the time of laying the charge, or to a delegated officer empowered to act in one of these capacities.[273]

The officer to which the charges are referred then determines whether he or she has jurisdiction to preside over a summary trial of the offenses alleged, having regard to matters such as the rank of the accused, whether the accused has elected to be tried by court martial, and whether he or she has not conducted or supervised the investigation, laid or caused charges to be laid, or issued a search warrant (in which case, he or she would be precluded from presiding over a summary trial).[274]

If an officer has jurisdiction to preside over a summary trial he or she must still consider whether or not to exercise the discretion to do so, having regard to factors such as the punishment that may be imposed at summary trial (the maximum punishment for summary trial before a commanding officer being detention for 30 days) and whether it is appropriate to try the case having regard to the interests of justice and discipline.[275]

273 *Id.*, at para. 76.
274 *Id.*
275 *Id.*

Where the charges require trial by court martial (or the accused has elected to be tried by court martial, or the commander has chosen not to preside over a summary trial), the charge is referred to a 'referral authority' (a class of officers legally empowered to refer a charge to the DMP). This referral authority must either forward the charge to the DMP, adding any appropriate recommendations regarding disposition and whether to proceed, or, in circumstances in which a commanding officer forwarded the charge to the referral authority in the belief that he lacked the requisite powers of punishment to try the accused in a summary trial and the referral authority disagrees with this view, direct the commanding officer to try the accused by summary trial.[276]

Once the DMP receives charges, the DMP reviews the charge for issues such as sufficiency of evidence, and the public interest of the Canadian Forces in prosecution. The DMP may require additional investigation from CFNIS (see above), before determining that the offense should be dealt with at court martial (on charges he or she believes are supported by evidence), or that he or she is satisfied that it may be referred back to an officer with jurisdiction to try the accused by summary trial.[277]

A decision by the DMP not to prosecute may be subject to judicial review, but courts will only undertake such a review of the exercise of prosecutorial discretion in extraordinary cases, where there has been a clear abuse of process.[278]

276 *Id.*, at para. 81.

277 *Id.*, at para. 82.

278 *Id.*, at paras. 100, 111.

AUSTRALIA

When to Report and Investigate: Routine Processes

49. Possible violations of the law of armed conflict will be subject to requirements for incident reporting and possibly also to a 'quick assessment' process, unless it is clear from the outset how the investigation should proceed.

Members of the ADF must report 'notifiable incidents' immediately. Notifiable incidents include any incident that raises a reasonable suspicion of an offense against the disciplinary code (other than a minor offense), or against Australian or foreign criminal law involving Defence personnel, property or premises. However, it also includes death, serious injury or disappearance of non–Defence personnel (other than enemy combatants) involving any Defence activity, property or premises, *even where there may be no reasonable suspicion of an offense*. If there is a death, serious injury or disappearance of an enemy combatant while in the custody or effective control of Defence personnel, then this too qualifies as a notifiable incident. Notifiable incidents also include any other incident deemed by commanders or managers to be serious, sensitive or urgent, for example events that might bring Defence into disrepute, or attract media or Parliamentary attention. If there is doubt as to whether a matter is a notifiable incident, it should be reported.[279]

The reporting chains vary slightly depending on the nature of the notifiable incident. Incidents of death or serious injury to civilians (or to enemy combatants in the custody of Defence personnel) must be reported to the chain of command (the operational commander, who then provides it to theatre command and the Commander Joint Operations in Australia

279 *The Australian report*, *supra* note 2, at para. 48.

(CJOPS)) and to a Defence Investigative Authority (ADFIS or the service police) for action, and to the service provost marshal for information.[280]

The incident report is based on information from the operational log. It must contain, as a minimum, the date, time, location and nature of the incident, details of those involved, and involvement of media or civil authorities.[281]

In the event of a notifiable incident, commanders and managers have various responsibilities, including, after consulting with the appropriate Defence Investigative Authority (usually ADFIS or the relevant service police), taking all reasonably available steps to preserve potential evidence in order to ensure that it is not lost, destroyed, or compromised; and prevent interference with witnesses or the construction of false defenses. They are also required to afford all reasonable assistance to personnel of the relevant Defence Investigative Authority. Where it is necessary for mission accomplishment or the safety of personnel, access of investigators to an area may be restricted, but this is to be for the minimum period necessary.[282]

When ADFIS or the relevant service police receive a notifiable incident report concerning reasonable suspicion of an offense against the DFDA, they must decide whether to attend the incident site, commence an independent investigation, or refer the matter to another party (a more appropriate investigative authority, the civilian authorities, the initiating authority or another area of Defence) for investigation or action. If the incident has occurred in an operational area, ADFIS or the service police must consult with the relevant operational commander to determine whether there are safety, security or operational issues that might impact on the commencement of an investigation.[283]

280 *Id.*
281 *Id.*
282 *Id.*
283 *Id.*

When ADFIS or the relevant service police receives a notifiable incident report concerning civilian death, serious injury or disappearance, that does not, in itself, raise a suspicion that an offense has occurred, ADFIS or the service police are required to respond as necessary to render immediate assistance, contact civilian police, and ensure the securing of the incident area and preservation of evidence.[284]

'Quick Assessment'

50. The 'quick assessment' (QA) process interlocks with reporting obligations. Quick assessments may be undertaken on the initiative of a commander or supervisor, or they may be initiated following an incident report. A QA should be completed within 24 hours and transferred to the Commander Joint Operations (CJOPS) in order for him to decide whether to continue an administrative investigation or to initiate a criminal investigation. It comprises a brief statement of the facts, without formal statements, and (if the individual preparing the QA is directed to make recommendations) recommendations for future actions, together with a written endorsement or decision of a commander in response. The officer undertaking the QA would usually speak to the personnel involved in the incident to understand what occurred, and the relevant context.[285]

Any member of the ADF may be directed to conduct a QA, but objectivity and impartiality is necessary, so individuals in the chain of command or line management of the person(s) involved in the incident may only be selected if they have no involvement or personal interest in the matter.[286]

The QA may be conducted when other inquiries are occurring,

284 *Id.*

285 *Id.*, at para. 49.

286 *Id.*

but must not interfere with such other inquiries or investigations.[287] If, in the course of a QA, it becomes evident that a notifiable incident may have occurred, this must be reported to the commander or supervisor immediately and reported accordingly. The QA must still be completed but the individual undertaking the QA is required to liaise with investigators from ADFIS to ensure that he does not interfere with investigations.[288]

On the basis of the incident report and QA, the CJOPS decides whether a 'full administrative inquiry' is warranted. It is current policy that a full administrative inquiry will be undertaken in the event of a death of a member of the ADF, significant destruction of property, and civilian deaths (other than deaths of individuals taking a direct part in hostilities).[289]

If either a QA or a full administrative inquiry raises the possibility that there has been a violation of the law of armed conflict, the CJOPS (in consultation with the Chief of the Defence Forces, and the Chief of the relevant service) instructs the ADF Investigative Service to conduct a criminal investigation (if ADFIS has not commenced such an investigation already).

How to Investigate: Routine Processes

51. As noted above, QAs are not considered investigations in their own right, but they may give rise to investigations, most relevantly, for the purposes of this Report, 'full administrative inquiries' and 'criminal investigations'. The decision to launch an administrative inquiry lies with the ADF executive leadership and the decision over whether to launch a criminal investigation is at the discretion of the ADF Provost Marshal, the head of the ADFIS organization. There is no publicly accessible statement of ADFIS policy on the triggering thresholds for the initiation

287 *Id.*

288 *Id.*

289 *Id.*, at para. 50.

of a criminal investigation, nor is there any publicly accessible statement of ADF policy on the triggering thresholds for an administrative inquiry in response to a report of a notifiable incident and subsequent QA. In the absence of any access to a clearly articulated policy, it is impossible to know whether there is any consistency of approach and, if so, the bases for such consistency.[290]

Australia has not had any prosecutions arising out of alleged violations of the law of armed conflict, although a court martial was recently convened to hear charges of criminal negligence in connection with conduct on the battlefield. This case provides an example of a situation in which both a QA and a full administrative inquiry were used. The incident giving rise to the charges involved five Afghan children who were killed during a night raid on a compound in Oruzgan when soldiers posted a grenade into a room from which they were receiving fire. The inquiries culminated in charges including involuntary manslaughter by criminal negligence, but the court martial upheld objections to the charges on the basis that there was no legally enforceable duty of care owed by ADF members in the context of combat operations, and the trial did not proceed.[291]

'Full Administrative Inquiry'

52. In relation to incidents where there is no suspicion of an offense, a range of administrative inquiries are open. For more serious incidents, there is a graduated scale of inquiries requiring escalated levels of authorization.[292] The main forms of such administrative inquiries are: Minister of Defence General Court of Inquiry, Chief of the Defence Force Commissions of Inquiry, Boards of Inquiry, and Inquiry Officer inquiries. Each of these is conducted under statutory authority and in accordance with established procedures.

290 *Id.*, at para. 77.

291 *Id.*, at para. 52.

292 *Id.*, at para. 50.

An inquiry into civilian death or injury (in the absence of a reasonable suspicion of a violation of the law of armed conflict) would usually be conducted by an Inquiry Officer. An inquiry of this kind involves the drafting of terms of reference and the appointment of an Officer (usually an ADF Officer) and supporting staff either by the commanding officer in the theatre of operations or by CJOPS in Australia. The inquiry team is deployed to the theatre of operations and may be based there for the duration of the inquiry. The Inquiry Officer interviews all key participants in relation to any incident and prepares a draft inquiry report explaining what the Inquiry Officer believes happened during the incident, the context in which the incident occurred and any recommendations for subsequent action. The draft is distributed to key participants who are provided an opportunity to comment on the Inquiry Officer's proposed recommendations. The Inquiry Officer then finalises the report and files it with CJOPS.[293] Inquiry Officer inquiries are generally conducted in private, without formal hearings. However, some reports of inquiries have been made public (with appropriate redactions).[294]

Criminal Investigation

53. A criminal investigation would be opened by ADFIS in the case of a suspected law of armed conflict violation. ADFIS deploys its own investigators to the theatre of operations, interviews participants in the incident and gathers evidence in order to produce a brief of evidence for the DMP. At the conclusion of a criminal investigation, a copy of the brief of evidence is provided to the commander or manager, together with details of the action taken (such as referral to the DMP). On the basis of that brief of evidence, the DMP makes a decision regarding the appropriate course of action – further specific inquiries by ADFIS, the

293 *Id.*

294 *Id.*

laying of charges and/or the initiation of criminal proceedings. The DMP too is required to keep commanders or managers informed of progress on the matter.[295]

In conducting criminal investigations, ADFIS is required to investigate independently, free of influence from the chain of command or line management, but any investigation will require close consultation between commanders or managers and ADFIS. Only the Provost Marshal of ADFIS (and the provost marshals of the service police) have the authority to suspend or terminate an investigation. It must be noted, however, that because the Head of ADFIS reports to the Chief of the Defence Force, it is possible that an ADFIS decision to investigate could be overruled by the chain of command at the highest level. The Chief of the Defence Force, CJOPS, Vice Chief of the Defence Force and the service chiefs may request that an investigation be suspended, but such requests must be in writing and recorded in the Defence Policing and Security Management System (a database holding all notifiable incident reports and investigation reports), and a decision to suspend or terminate the investigation, and reasons for the decision, must likewise be recorded in DPSMS.[296] Any decision of the DMP to lay or not to lay charges may be reviewed by the High Court of Australia pursuant to the general provision of section 75(v) of the Constitution – the writ of mandamus to compel the performance of a public duty or the exercise of a public official's discretion according to law. It should be noted that no such action has ever been initiated against the DMP in response to her decision to lay or not to lay charges.[297]

295 *Id.*, at para. 51.

296 *Id.*

297 *Id.*

Occasional and Ad Hoc Investigative Mechanisms

54. Australia has broadly similar systems of parliamentary committees to the US, the UK and Canada. Moreover, the Government may initiate public inquiries of various kinds to inquire into matters including potential violations of the law of armed conflict. Thus for example, the Senate Foreign Affairs, Defence and Trade Committee undertook a limited inquiry in 2005, following press coverage regarding abuse of detainees in Iraq. The inquiry addressed questions about whether Australian personnel had been present during interrogation of detainees; whether knowledge or concerns about treatment of detainees was reported by Australian personnel to Australian government agencies; and what action followed such reports. The Committee lamented the poor quality of the evidence it received. The Committee concluded that ineffective record keeping, haphazard reporting processes, and poor communication networks indicated that the reporting and communication processes with the Department of Defence were inadequate in some respects.[298]

In relation to *ad hoc* internal inquiries, it is appropriate to mention again the audit and investigation work of the IGADF (Inspector–General of the ADF, discussed above, paragraph 25). The IGADF may initiate inquiries on his own motion (or be requested to do so by the Chief of the Defence Force, a service chief or any other individual), and has previously inquired into the conduct of an investigation of allegations of unlawful killing involving Special Air Services personnel in East Timor. The report was highly critical of the investigative process (although the finding was not that the investigation had not been thorough; rather it had been overly prolonged and collected significant material, but not material that would be admissible).[299] The IGADF also conducts routine, random audits

298 *Id.*, at para. 28; See also: Senate Foreign Affairs, Defence and Trade Committees, *Duties of the Australian Personnel in Iraq* (Aug. 18, 2005), *available at:* www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004–07/iraq/report/index.htm.

299 *The Australian report*, *supra* note 2, at para. 29.

of military justice practices and procedures in units, checking for such problems as abuse of authority, but also failure to pursue proceedings in cases of wrongdoing. These audits are part of a systematic programme, so they are not strictly speaking *ad hoc* internal inquiries in the way that parliamentary inquiries are, nor are they part of a routine response to every case of civilian death or suspicion of a criminal offense.[300]

Proceedings Following Investigation

55. The DMP, a commanding officer or an ADF member authorised in writing by a commanding officer,[301] has the discretion to lay charges of service offenses against an ADF Member (or against a defense civilian). If charges are laid in respect of a criminal offense, the case will be tried before a 'service tribunal'; for most serious offenses (for example, offenses carrying a penalty of imprisonment for more than two years), the case will be tried before a court martial or a Defence Force magistrate. Details of these institutions are provided above, in paragraph 25.

Currently[302] there is no permanent standing military court, and convictions in service tribunals are all subject to review by 'reviewing authorities' (offices appointed for this purpose). Reviewing authorities have various powers, including a power to quash the conviction, but only on specific grounds (such as if it appears to him that the conviction is unreasonable or cannot be supported having regard to the evidence). Reviewing authorities rely on reports from legal officers in the exercise of their functions and are bound by such reports on questions of law.[303] Most punishments must also be approved by a reviewing authority before they take effect. In addition to this procedure for approval, a reviewing

300 *Id.*, at para. 66.

301 *DFDA*, at Article 87(1).

302 For a discussion of the historical developments of the Australian military justice system see: *The Australian report*, *supra* note 2, at paras. 1, 7–11.

303 *Id.*, at para. 56.

authority may quash punishments that he considers are wrong in law, or excessive.[304]

UNITED KINGDOM

When to Report and Investigate: Routine Processes

56. Once a commanding officer becomes aware of an allegation or circumstances that would indicate to a reasonable person that a 'Schedule 2 offence' has or may have been committed by a person under their command, the commanding officer must as soon as is reasonably practicable ensure that a service police force is aware of the matter.[305] Schedule 2 offenses include general criminal law offenses of murder and manslaughter, as well as any alleged breach of the International Criminal Court Act 2001 (genocide, crimes against humanity or war crimes).[306] Because such offenses are almost certainly investigated by service police, a commander's powers to investigate alleged breaches of the law of armed conflict are very limited.[307]

There is a regime for investigation of suspected Service offenses that may become relevant in the event of conduct which would not constitute a 'Schedule 2 offence'. In such a case, if a reasonable commanding officer would take the view that a Service offense has, or may have, taken place, the commanding officer must investigate, or ensure the relevant service police are aware of the matter.[308] If the service police do not investigate, the commander may still opt not to investigate himself and instead nominate another officer of equal rank from outside the immediate operational chain of command to investigate.

304 *Id.*

305 *The UK report*, *supra* note 2, at para. 4.11.

306 *Id.*, at para. 3.09.

307 *Id.*

308 *Id.*, at para. 3.49.

It seems that the decision of the Grand Chamber in *Al–Skeini and Others v. United Kingdom* (hereinafter: the *Al–Skeini* decision)[309] will require the armed forces to take on additional responsibilities for preservation of the scene of any alleged breaches of Articles 2 or 3 of the European Convention on Human Rights.[310]

How to Investigate: Routine Processes

Service Offenses Investigation

57. An investigation of suspected Service offenses may be carried out by anyone under the command of the commanding officer, and is subject to detailed guidance.[311] There is some evidence that, even for suspicion of offenses falling short of Schedule 2 offenses, the practice is to appoint a commanding officer who is outside the operational command structure of the subordinates suspected, in order to consider whether an investigation is warranted.[312]

Criminal Investigation

58. Criminal investigations are conducted into alleged Schedule 2 offenses. There is very limited scope for operational level or unit level investigations of possible law of armed conflict violations. Investigations of breaches of standing orders or of other operating procedures may, of course, be conducted at this level. It is possible, however, in exceptional circumstances where, for operational reasons, no service police are available to attend the scene and investigate, a commanding officer may begin to investigate a Schedule 2 offense. If this occurs, it is nevertheless

309 *Al–Skeini* decision, *supra* note 6.

310 *Id.*, at para. 1.26.

311 *Id.*, at para. 3.49, *fn* 214.

312 *Id.*, at para. 3.10.

a departure from normal procedure and commanding officers are urged to involve the service police as soon as is reasonably practicable.[313]

Once possible violations of the law of armed conflict are reported to Service police by commanders (or other parties), the Service police have control of the investigation. If the Service police consider that there is sufficient evidence to charge a person with a Schedule 2 offense, they are required to refer the case to the Director of Service Prosecutions (DSP).[314] If they decide that there is not sufficient evidence, they must still consult the DSP.[315] Where there is not sufficient evidence to bring a charge, the case may be referred back to the commanding officer to determine whether the individual should be charged with a service offense which is not a Schedule 2 offense.[316]

When a case is referred to the DSP, the Service police inform the commanding officer of the relevant individual.[317] The Prosecutors' Pledge of the Service Prosecuting Authority includes notifying victims if a prosecution is not to be brought.[318] The DSP has exclusive responsibility for deciding whether or not to lay charges. If charges are laid they will be tried in the Court Martial. The consent of the Attorney–General is required for prosecution of offenses under the International Criminal Court Act.[319] A decision of the DSP not to prosecute could be subject to judicial review in the High Court, as with a decision of the Director of Public Prosecutions.[320]

313 *Id.*
314 *Id.*, at para. 4.05.
315 *Id.*, at para. 3.20.
316 *Id.*
317 *Id.*, at para. 3.09.
318 *Id.*, at para. 3.19.
319 *Id.*
320 *Id.*

Occasional and Ad Hoc Investigative Mechanisms

59. Parliamentary committees in the UK may inquire into a range of matters. In the UK, it is a constitutional requirement that legislation governing the armed forces must be renewed every five years, and in practice the quinquennial review serves as an opportunity to examine the operation of the armed forces, including the military justice system. Ordinarily, a Select Committee is established to consider the draft bill and hold hearings, before debate is conducted in the House.[321]

Public inquiries may also be initiated, and legislation sets out the powers and duties of such inquiries. There have been several such inquiries dealing with matters touching on the law of armed conflict. For example, one such public inquiry was established to investigate the death of Baha Mousa, an Iraqi citizen, while in the custody of the British armed forces in Basra in 2003. This matter was previously the subject of investigations by the Royal Military Police, and gave rise to the conviction of one individual by Court Martial on a charge of inhuman treatment. The final report was published on 8 September 2011. In relation to the circumstances surrounding Baha Mousa's death, the inquiry discussed the failure to report what had been seen at the detention facility and recommended the prohibition of interrogation techniques. The Government accepted all but one of the recommendations of the Report.[322] Another relevant public inquiry is the Al Sweady Inquiry which is investigating allegations of unlawful killing and abuse of detainees at Camp Abu Naji and the Shaibah Logistics Base in Southern Iraq in 2004.[323]

Parliamentary or public inquiries may jeopardize future criminal proceedings, and in light of this, inquiries will usually not commence until related criminal proceedings have been finalized. In the Baha Mousa case,

321 *Id.*, at para. 3.50.

322 *Id.*, at para. 4.28.

323 *Id.*, at paras. 1.33–1.35.

the public inquiry did not begin until after court martial proceedings against accused individuals had concluded.[324] In the case of the Al Sweady Inquiry, however, the inquiry has proceeded (following unsatisfactory earlier investigations by the Royal Military Police) and the Attorney–General has provided an undertaking to witnesses that no evidence provided to the Inquiry will be used in criminal proceedings against them, or for the purposes of determining whether to commence criminal proceedings (other than for offenses related to the giving of false evidence to the public inquiry and the like).[325]

Litigation in relation to the investigation obligations arising under the European Convention on Human Rights may play a role in determining whether public inquiries are initiated. In the Al Sweady case, relatives of the dead sought, as a remedy, the opening of an independent and impartial investigation into the deaths. The Secretary of State asserted, *inter alia*, that such an investigation was not required, as there had already been an adequate investigation by the Royal Military Police. In the event, the claim for judicial review was stayed, and a public inquiry was initiated, but a judgment of the High Court of Justice expressed significant criticism of the Royal Military Police investigations.[326]

In addition to public inquiries, the armed forces may themselves initiate investigations into particular matters. The British Army has, for example, commissioned an inquiry into incidents of unlawful killing and detainee abuse in Iraq in the period 2003–2004. The report, prepared by Brigadier Aitken, Director of Army Personnel Strategy, noted various measures taken since 2003 to prevent recurrence of killings and abuses, and made further recommendations.[327]

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324 *Id.*, at paras. 1.33, 2.14–2.16.

325 *Id.*, at para. 2.14.

326 *R (on the application of Al–Sweady and Others) v. Secretary of State for the Defence* [2009] EWHC 2387.

327 *The UK report*, *supra* note 2, at para. 1.36.

The Ministry of Defence has also established an Iraq Historic Allegations Team (IHAT), led by a retired civilian senior police officer. The Team was charged with investigating allegations of abuse by members of the British armed forces in Iraq, with a view to ensuring that further criminal proceedings can be initiated if appropriate. The High Court [Divisional Court] declined to hold that a full public inquiry into these allegations was required under the European Convention on Human Rights, at least pending completion of the work of IHAT. It had been argued that IHAT lacked the requisite independence (among other things, because it included individuals from the Special Investigations Branch of the Royal Military Police, and members of the other branch of the Royal Military Police, responsible for General Police Duties, who may have been implicated in wrongdoing). This was accepted by the Court of Appeal [Civil Division] in Mousa which held that the involvement of the Provost Branch in Iraq led to the perception that IHAT lacked independence.[328]

Proceedings Following Investigation

60. In relation to suspected Service offenses falling short of Schedule 2 offenses, the commanding officer may, in theory, lay any charges necessary. However, the commanding officer is always at liberty to refer these matters to the Director of Service Prosecutions.[329] The *Manual of Service Law* states that, in cases of any form of violence or abuse against a victim who is not a member of the UK armed forces, or who is being held in service custody, the commanding officer should refer the matter to the DSP, unless he or she is completely satisfied, having taken legal advice, that he should bring the charge.[330]

Service offenses which can be dealt with at a summary hearing include,

328 *The Queen (on the application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin); on appeal to the Court of Appeal, [2011] EWCA Civ 1334; See: *The UK report*, *supra* note 2, at paras. 1.34, 2.16.

329 *The UK report*, *supra* note 2, at para. 3.49, *fn* 214.

330 *Id.*, at para. 3.18, *fn* 161.

of those most relevant to law of armed conflict, looting, disobedience to a lawful command, and negligent performance of a duty, as well as offenses under the general criminal law such as criminal damage and assault occasioning actual bodily harm.[331] Punishments that may be imposed at a summary hearing are limited to detention in a military barracks or training unit for up to 90 days, a fine of up to 28 days' pay, and reduction in rank.[332]

Other offenses must be tried before a Court Martial, a standing body described in more detail above, in paragraph 27.

GERMANY

When to Report and Investigate: Routine Processes

61. Aside from the obligations to report suspected criminal offenses to civilian prosecutorial authorities, there do not appear to be distinct reporting obligations in Germany of the kind that exist in some other systems.[333] Operational debriefings have no impact on investigations and are regularly ignored.[334]

Violations of the law of armed conflict may constitute malfeasances subject to disciplinary measures under the Code of Law for Members of the Armed Forces, and are thus subject to the investigative processes used for malfeasances. A commander is obliged to initiate an investigation as soon as facts become known to him that justify the suspicion of a malfeasance.[335] However, if a commander believes there has been a criminal offense, the

331 *Id.*, at para. 3.18.

332 *Id.*

333 *The German report*, *supra* note 2, at Appendix V.

334 *Id.*, at para. 56.

335 *Id.*, at para. 48.

matter must immediately be transferred to the civilian prosecutorial authorities.

How to investigate: Routine Processes

Malfeasance Investigation

62. Usually, a commander will ask his legal adviser to investigate, with the support of the military police.[336]

In the usual course of events, members of the armed forces are required to answer and tell the truth if interrogated about an incident. If being questioned about a disciplinary matter which may entail sanctions imposed by the superior officer, they may choose whether or not to answer, but if they answer, they must tell the truth. These requirements do not apply in court proceedings, either in the military disciplinary court or in a regular criminal proceeding.[337]

If the investigation reveals sufficient grounds for suspicion that a criminal offense has been committed , the commanding officer must put the disciplinary process on hold and submit the results of the investigation to a civilian prosecutor's office (as noted above, it is often difficult to determine which prosecutor is relevant, but the practice is that the Office of the Prosecutor in Potsdam will be the first point of contact for crimes committed abroad by or against members of the armed forces, and may then refer the matter to the Federal Prosecutor–General, if the alleged conduct may amount to a war crime under the Code of Crimes against International Law, or to another prosecutor in whose district the accused had his last post in Germany).[338]

336 *Id.*

337 *Id.*, at para. 55.

338 *Id.*, at paras. 57, 95.

As soon as the criminal matter is resolved, the malfeasance proceedings may continue. Proceedings for serious disciplinary offenses are brought in tribunals established within the Ministry of Defence, and these tribunals are bound by the factual findings of the criminal court.

Routine Investigation in Cases of Civilian Death

63. It is a policy that, in every instance in which a civilian is killed by members of the German armed forces, an investigation is commenced.[339] The investigation undertaken resembles the investigation of a disciplinary offense, and involves the Federal Prosecutor–General, along with military police.[340]

Criminal Investigation

64. In most cases concerning alleged violations of the law of armed conflict, the commanding officer notifies a civilian prosecutor in the early stages of the investigation. Civilian prosecutors have no authority over military authorities and thus no formal authority regarding the conduct of the military investigation, but they may express views regarding an eventual prosecution and inform military authorities accordingly.[341] The prosecutor has no opportunity to investigate on the relevant site; at most, he may be consulted by military authorities as they investigate. This may create difficulties in establishing the facts.[342]

Once a matter concerning violation of the Code of Crimes against International Law has been submitted to the prosecutor and evidentiary thresholds for prosecution are satisfied, the matter must be prosecuted unless a specific exemption applies.[343] Many of these exemptions

339 *Id.*, at para. 47.

340 *Id.*

341 *Id.*, at para. 58.

342 *Id.*, at paras. 49–50 (for difficulties in the Colonel Klein case, see at para. 97).

343 As to which see: *Id.*, at para. 72.

are designed to prevent the use of the German legal order as a forum for investigation and prosecution in circumstances in which alleged war criminals are not German and their conduct is not connected with Germany.[344] A decision of the prosecutor to rely on these exemptions is not subject to judicial review, but a decision to terminate proceedings because of a lack of evidence may be subject to challenge.[345]

Occasional and Ad Hoc Investigative Mechanisms

65. There is a possibility of a parliamentary inquiry in Germany. For example, the federal parliament (*Bundestag*) conducted an inquiry into wrongdoings associated with 'the Colonel Klein affair' (an air strike near Kunduz in September 2009, which resulted in a considerable number of civilian casualties). The parliamentary inquiry limited its role to considering allegations against senior individuals, including the Minister of Defence, the Joint Chief of Staff and Chancellor, of lying to the public and mismanaging the investigation in Afghanistan. It did not consider the possibility of any breaches of the laws of war by the individuals concerned.[346] This is based on the fact that the decision whether or not an act is a criminal offense is decided by the courts and cannot, for reasons of the constitutional separation of powers, be established by any other body.

Proceedings Following Investigation

66. Criminal offenses by members of the armed forces, including violations of the Code of Crimes against International Law, will be tried in the civilian courts.

344 As was the case in complaints against Chinese President Jiang Zemin, the then–Vice President of Chechnya, and the then–Secretary of Defence of the US, although the interpretation of these exemptions has not been without controversy: *Id.*, at paras. 74–81.

345 *Id.*, at paras. 82–83.

346 *Id.*, at para. 98.

More serious disciplinary offenses must be tried before *Truppendienstgericht*, discussed in paragraph 29, and may carry sanctions of reductions in pay and pensions, prohibition of promotion, reduction in rank and discharge. Less serious disciplinary offenses may be sanctioned by the commander, who is empowered to impose censure, fines up to a certain limit, curfew and detention, and detention for a period of up to three weeks.[347]

NETHERLANDS

When to Report and Investigate: Routine Processes

67. Under the code of criminal procedure which applies to offenses by civilians and members of the armed forces alike, anyone can make a complaint regarding suspected wrongdoing, with any law enforcement officer (regular civilian police or the Royal Military Constabulary). The complaint will then be transferred to the appropriate prosecutorial authority.[348]

All members of the armed forces are obliged to report any knowledge of possible violations of the law of armed conflict to the responsible authorities.[349]

If there are no grounds for suspecting a criminal offense, a commander (or the Ministry of Defence or Public Prosecution Service) can initiate an internal investigation into any incident. If a reasonable suspicion arises that a criminal offense may have been committed, the commander is required to make an official report without delay

347 *Id.*, at para. 95.

348 *The Netherlands report*, *supra* note 2, at paras. 70–72.

349 *Id.*, at para. 71.

to the Royal Military Constabulary, and to terminate the internal investigation.[350]

As a matter of practice rather than law, there is a special reporting and investigation procedure to account for uses of force and their consequences. After any use of force (whether a discharge of a warning shot or a full–scale engagement of several days' duration) has occurred, an 'After Action Report' must be submitted by the commander on location.[351] This report is both part of the operational information provided to the Commander of the Armed Forces, and a mechanism for ensuring legal oversight and accountability for any use of force.[352] A copy of the report is made available to the Public Prosecution Service by the commander of the Royal Military Constabulary detachment accompanying the mission. The Public Prosecution Service determines as soon as possible, on the basis of this report, whether criminal investigation or fuller factual investigation is called for.[353]

There are no fixed criteria in law or policy to which the Public Prosecution Service has reference in deciding whether a fuller factual investigation is required, although factors such as the nature of the incident and the seriousness of the consequences appear to play a role. In practice, a fuller factual investigation will be undertaken whenever civilian death or serious injury results from the actions of the Netherlands armed forces.[354] This policy applies regardless of the intensity of hostilities, although the way in which it is applied may vary with the nature of the operation and the factual circumstances in the area of deployment.[355] The standards for admissibility of evidence in Dutch criminal procedure constitute the paradigm for evidence collection, although it will not always be possible to

350 *Id.*, at paras. 74–75, 77.

351 *Id.*, at paras. 50, 79–80, 88.

352 *Id.*, at paras. 50, 80.

353 *Id.*, at para. 50.

354 *Id.*, at para. 79.

355 *Id.*, at the responses to questions.

meet these standards in operational circumstances. Finally, it is important that the investigation record states how the investigation was conducted and how the circumstances had influenced its conduct.[356]

This practice of conducting a factual investigation in all cases of civilian death or serious injury is based, in part, on the requirements of the European Convention on Human Rights, which the Netherlands applies, as a matter of policy, whenever its armed forces are operationally deployed.[357]

How to Investigate: Routine Processes

Internal Investigation

68. Internal investigations may be carried out by commanders. Internal investigations are aimed at obtaining the best possible picture of the facts surrounding an incident, and determining whether there are grounds for suspecting criminal conduct.[358] As noted above, a fuller factual investigation is carried out by the Royal Military Constabulary in cases of death or serious injury to civilians. An internal investigation may continue while a fuller factual investigation is in progress. For example, in January 2008, following a 'friendly fire' incident in Uruzgan province, Afghanistan, both the Ministry of Defence and the Public Prosecution Authority sent teams to the area to conduct factual investigations. The two teams, while having different responsibilities, cooperated and the Public Prosecution Service was able to use the results of the Ministry of Defence investigation in its report.[359]

356 *Id.*; In one case, the Court of Appeals, in considering a case involving a decision not to bring a prosecution in relation to a checkpoint incident, has referred to the difficulties in gathering evidence in operational contexts, see: *Id.*, at para. 93.

357 *Id.*, at paras. 79–80.

358 *Id.*, at para. 77.

359 *Id.*, at para. 78; Factual investigations were also carried out in relation to, for example, reports that Netherlands Air Force Apache helicopters had caused civilian casualties when firing on two vehicles in the Chenartu District, Uruzgan Province; and in relation to the deployment of a Netherlands Air Force F16 in Helmand Province, resulting in the deaths of a number of civilians, including children: see: *Id.*, at para. 96.

If, in the course of the internal investigation, a reasonable suspicion arises that a criminal offense has been committed, the commander must terminate any internal investigation. The individuals involved will be treated as suspects and the investigation will from that point be conducted as a criminal investigation.[360]

'Fuller Factual Investigation'

69. Fuller factual investigations are carried out by the Royal Military Constabulary under supervision by the District Prosecutor. The procedure for factual investigation is not regulated by law, but is rather a matter of policy. During a factual investigation the persons involved can be heard as witnesses but are not required to answer questions which could result in self–incrimination. The commander will usually be involved in order to provide a complete situational picture, although this is not required.[361]

As noted above, if there is a reasonable suspicion that a criminal offense has been committed, the investigation immediately becomes a criminal one.

Criminal Investigation

70. A criminal investigation will be conducted by the Royal Military Constabulary, in accordance with the same rules applicable to the investigation of suspected criminal offenses by civilians, and in consultation with, and under the general supervision of, the Public Prosecution Service. When a unit is outside the territory of the Netherlands and there is no Royal Military Constabulary present or readily available, commanders may

360 *Id.*, at paras. 47, 75, 77.

361 *Id.*, at para. 74.

exercise powers of investigation given to the adjunct assistant prosecutors or police officers.[362]

In a criminal investigation, the commander must be heard as a witness in order to obtain an accurate picture of the operational situation.[363]

Occasional and Ad Hoc Investigative Mechanisms

71. Inquiries may be initiated by the Dutch parliament into matters including possible violations of the law of armed conflict. The government may also initiate an independent inquiry into situations involving potential violations of the law of armed conflict, or other matters related to military operations in which the armed forces were or had been involved.[364]

There are precedents for both parliamentary and government–initiated inquiries into military matters. For example, after the fall of Srebrenica in July 1995 and the ensuing genocide, the government (with parliamentary approval) initiated an investigation by the Netherlands Institute of War Documentation into the circumstances of the fall of Srebrenica and the role of the Netherlands contingent (DUTCHBAT) in the UN peacekeeping force. A report produced in 2002 led indirectly to the fall of the government. The lower chamber of the Parliament subsequently initiated an inquiry, conducting public hearings and questioning witnesses, culminating in a report in early 2003. There were also other investigations by NGOs and lobby groups, as well as litigation by family members of victims of the Srebrenica massacres.[365]

There are also examples of other public inquiries in relation to allegations of torture of Iraqi detainees by the Military Intelligence Service

362 *Id.*, at para. 47.
363 *Id.*, at para. 75.
364 *Id.*, at para. 22.
365 *Id.*, at para. 23.

(rather than the armed forces), including factual investigation by an independent commission and an investigation by the Oversight Committee for the Intelligence Services.[366]

If there was a reasonable suspicion of criminal conduct, parliamentary or other public inquiries would refrain from addressing questions pertaining to potentially criminal conduct, or the inquiries would be suspended to allow criminal inquiries to take their course.[367]

Proceedings Following Investigation

72. Violations of the International Crimes Act are to be tried in the District Court in The Hague unless the crime has been committed by a member of the armed forces. In such a case, the offenders are to be tried in the Military Chamber of the District Court in Arnhem.

A decision by the prosecutorial authorities not to bring a particular matter to trial may be subject to judicial review.[368]

366 *Id.*, at para. 90.

367 *Id.*, at paras. 22, 38.

368 *Id.*, at para. 30.

D. Key Points Emerging From The Comparative Survey

73. This section summarizes findings from the comparative survey on some key points which the Commission has chosen to emphasize. The discussion corresponds to the structure of the analysis throughout this Report (i.e., 'what to investigate?', 'when to investigate?', 'who investigates?' and 'how to investigate?'). It highlights some common trends and divergences in the countries surveyed for each of these categories.

What to Investigate?

74. *Legislating violations of the law of armed conflict*

a. The US has criminalized grave breaches of the Geneva Conventions 1949 and a small number of additional war crimes. All of the other countries surveyed have gone further by enacting domestic legislation criminalizing at least the war crimes set out in Article 8(2) of the Rome Statute.

b. The US is the only country out of the six surveyed that does not have an explicit provision in domestic criminal legislation imposing responsibility on commanders and superiors, however, arguably the doctrine of command responsibility exists in the US. All the other countries have gone further by enacting specific provisions on the responsibility of commanders and superiors that are similar in effect to Article 28 of the Rome Statute, rendering commanders or civilian superiors liable in certain circumstances in which, *inter alia,* war crimes are committed by subordinates.[369]

369 In addition to war crimes, Article 28 of the Rome Statute is concerned with all crimes within the jurisdiction of the International Criminal Court (genocide, crimes against humanity and aggression).

c. In some countries members of the armed forces are not charged under specific offenses pertaining to violations of the law of armed conflict. The US and Canada, as a matter of policy and practice respectively, charge members of their own armed forces with violations of the ordinary criminal law (whether found in a civilian or military code). The Netherlands and Germany have not indicted any members of their armed forces since the relevant legislation was enacted. In the one Australian case, involving charges for breaches of Australian military law incorporating criminal offenses, the DMP charged the accused with negligent manslaughter and not violations of the laws of war. The UK, on the other hand, has prosecuted a former serving member of its armed forces for 'inhuman treatment' under domestic legislation incorporating offenses set out in the Rome Statute.

WHEN TO INVESTIGATE?

75. In the majority of the countries surveyed there are distinct reporting and investigative duties. Incidents are reported by various mechanisms and they result in 'investigative processes'. This section will highlight specific issues relevant to the Commission's analysis which relate to the opening of various types of investigations. It begins by discussing the reporting duties in the different countries, which includes the kinds of incidents that need to be reported and the requirements concerning preservation of potential evidence. The section then discusses the thresholds for opening investigations. These investigations can be administrative or criminal and may also involve an initial fact–finding assessment.

76. Reporting Duties

1. Reporting Systems

Most of the countries surveyed have a comprehensive reporting system. Incidents that require reporting generally give rise to obligations to investigate (either through administrative or criminal systems). There are also obligations to investigate arising in circumstances that may not reach the threshold of an incident that must be reported.

a. In the US, if personnel may be involved in, or responsible for, a 'reportable incident', the incident must be reported through the chain of command. The reporting process is designed to be over–inclusive and, when in doubt, incidents should be reported. A reportable incident is a 'possible, suspected or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war, that would constitute a violation of the law of war if it occurred during an armed conflict'.

b. In Canada, there are various reporting requirements that may be relevant to a possible violation of the law of armed conflict. Queen's Regulations and Orders require that officers and non–commissioned members report to the 'proper authority' any infringement of relevant rules governing the conduct of persons subject to the Code of Service Discipline. Rule 11 of the Code of Conduct for Canadian Forces Personnel requires any breach of the law of armed conflict to be reported, whether to superiors in the chain of command, the military police, a chaplain, legal officer of any other person in authority. Additionally, there may be theatre–specific orders on reporting any 'significant incident'.

c. In Australia, members of the ADF must report 'notifiable incidents' immediately. Notifiable incidents include any incident that raises a reasonable suspicion of an offense against the disciplinary code

(other than a minor offense), or against Australian or foreign criminal law involving Defence personnel, property or premises. However, notifiable incidents also include death, serious injury or disappearance of non–Defence personnel (other than enemy combatants) involving any Defence activity, property or premises, *even where there may be no reasonable suspicion of an offense*. If there is doubt as to whether a matter is a notifiable incident, it should be reported.

d. In the UK, once a commanding officer becomes aware of an allegation or circumstances that would indicate to a reasonable person that a 'Schedule 2 offence' has or may have been committed by a person under their command, the commanding officer must as soon as is reasonably practicable ensure that the relevant service police force is aware of the matter.[370] Schedule 2 offenses include general criminal law offenses of murder and manslaughter, as well as any alleged breach of the International Criminal Court Act 2001 (genocide, crimes against humanity or war crimes).

e. In Germany, there are no distinct reporting obligations of the kind that exist in some other systems aside from the obligations to report suspected criminal offenses to civilian prosecutorial authorities.

f. In the Netherlands, under the code of criminal procedure which applies to offenses by civilians and members of the armed forces alike, anyone can make a complaint regarding suspected wrongdoing, with any law enforcement officer (regular civilian police or the Royal Military Constabulary). The complaint will then be transferred to the appropriate prosecutorial authority. In addition, all members of the armed forces are obliged to report any knowledge of possible violations of the law of armed conflict to the responsible authorities.

370 *The UK report*, *supra* note 2, at para. 4.11.

2. Provisions on Preservation of Evidence

As part of the initial reporting of 'reportable incidents' (US) and 'notifiable incidents' (Australia), commanders are instructed to take steps to preserve potential evidence. Importantly, in Australia, a civilian death or injury is a 'notifiable incident' regardless of whether any criminal offense is suspected, so the requirement to preserve evidence applies even for non–criminal investigations. For countries Party to the European Convention on Human Rights (UK, the Germany and Netherlands), it seems that the *Al–Skeini* decision will require the armed forces to take on additional responsibilities for preservation of the scene of any alleged breaches of Articles 2 or 3 of the European Convention on Human Rights.

77. The Threshold for Investigations

1. Administrative Investigation

There is no clear definition of when the duty arises to conduct an administrative investigation. However, such investigations are generally opened following incidents that are not sufficiently serious, and can lead to administrative penalties or non–judicial punishment. Administrative investigations tend to be summary investigations or boards of inquiry carried out under the authority of the chain of command, usually by a commanding officer.[371] In some countries (US), administrative investigations are used to gather additional informational about an alleged incident and may reveal grounds for suspecting criminal conduct. In other countries (Australia), they are used to investigate cases of civilian deaths where there is no reasonable suspicion of a criminal offense.

371 In the US, a battalion commander or a higher commander orders this investigation; in Canada, a commanding officer of a unit or the military police orders such an investigation; in Australia, a commander or CJOPS, orders the investigation depending on the nature of the administrative investigation; in the UK, a commanding officer orders an investigation; in Germany, a commander orders such an investigation; and in the Netherlands, a commander (or the Ministry of Defence or Public Prosecution Service) orders this kind of investigation.

2. Criminal Investigation

It is not always clear when a criminal investigation is *required* to be opened, but the threshold is generally one of 'reasonable suspicion' or 'reasons to believe' that a criminal offense has been committed.

a. In the US, a criminal investigation is generally opened in the case of reportable incidents, though the specific criteria on which Military Criminal Investigative Organization (MCIO) commanders determine whether to proceed with a criminal investigation are not publicly available. The MCIO's decision to investigate may be a result of a notification or request from a commander, the request of the Department of Defense Inspector–General, or on its own initiative.

b. In Canada, criminal investigations (known as 'disciplinary investigations') are conducted into an alleged service offense (violation of any law, including the Code of Service Discipline contained in the National Defence Act). Disciplinary investigations may be carried out by Canadian Forces National Investigation Services (CFNIS), the civilian police, base or wing military police, or, in the cases of minor breaches of discipline, unit authorities. CFNIS is most likely to be responsible for investigating violations of the law of armed conflict.

c. In Australia, a criminal investigation would generally be opened by Australian Defence Force Investigative Service (ADFIS) in the case of a suspected law of armed conflict violation though there is no publicly accessible statement on the triggering thresholds for the initiation of a criminal investigation.

d. In the UK, criminal investigations are conducted into alleged Schedule 2 offenses. Once possible violations of the law of armed conflict are reported to Service police by commanders (or other parties), the Service police have control of the investigation.

e. In Germany, criminal investigations are conducted into malfeasances. Violations of the law of armed conflict may constitute malfeasances subject to disciplinary measures under the Code of Law for Members of the Armed Forces. A commander is obliged to initiate an investigation as soon as facts become known to him that justify the suspicion of a malfeasance.

f. In the Netherlands, criminal investigations are conducted into suspected criminal offenses by members of the armed forces. The Royal Military Constabulary conducts these investigations.

78. Fact–Finding Assessment for Investigative Purposes

In some of the countries surveyed there is an initial fact–finding activity that complements reporting duties.

a. In the US, a 'preliminary inquiry', a type of administrative investigation, is undertaken to determine whether US personnel may be involved in, or responsible for, a 'reportable incident'. There is no definitive guidance regarding the conduct of a 'preliminary inquiry' but it is typically very informal and conducted by the commander personally or by a member of the command. If it is clear that a matter requires criminal investigation, because of its gravity or complexity, the preliminary inquiries may be simple and quick.

b. In Australia, a 'quick assessment' (QA) process interlocks with reporting obligations. QAs may be undertaken on the initiative of a commander or supervisor, or they may be initiated following an incident report. The QA is a fact–finding exercise and it must be completed within 24 hours. The QA may be conducted when other inquiries are occurring, but must not interfere with such other inquiries or investigations. If, in the course of a QA, it becomes evident that a notifiable incident may have occurred, this must be reported to the commander or supervisor

immediately and reported accordingly. The QA must still be completed but the individual undertaking the QA is required to liaise with investigators from ADFIS to ensure that he does not interfere with investigations.

WHO INVESTIGATES?

79. In the countries surveyed, the investigations outlined above are conducted by various authorities.

1. Administrative Investigations

Depending on the nature of the offense under investigation, administrative investigations are conducted by officers or commanders at all levels of the unit who were not involved in the incident under consideration. Often it is the member of the unit who orders the investigation that conducts it.

a. In the US, an officer uninvolved in the incident will conduct the inquiry and report to the commander.

b. In Canada, commanders at all levels must be able to conduct investigations for the effective and efficient administration of their units.

c. In Australia, for less serious incidents, the commanding officer in theatre can institute a routine inquiry. For more serious incidents, there is a graduated scale of inquiries requiring escalated levels of authorization.

d. In the UK, a reasonable commanding officer must investigate a Service offense or ensure that the relevant service police are aware of the matter. Another possibility is that the commanding officer may

nominate another officer of equal rank from outside the immediate operational chain of command to investigate.

e. In Germany, usually a commander will ask his legal advisor to investigate, supported by the military police.

f. In the Netherlands, a commander (or the Ministry of Defence) conducts the investigation.

2. Criminal Investigations

Once a criminal investigation is opened, typically investigative authorities proceed independently of the chain of command.

a. In the US, although MCIO investigations are conducted by members of the armed forces, they have separate reporting chains, usually to the Chief of Staff and Secretary of the relevant service.

b. In Canada, the CFNIS conducts criminal investigations, and the investigation is under a commanding officer who reports directly to the Canadian Forces Provost Marshal, in order to protect the ability of CFNIS to conduct investigations independently of any command influence.

c. In Australia, ADFIS is responsible for conducting investigations into all serious crimes, and such investigations must be free of influence from the chain of command or line management. However, any investigation will require close consultation with commanders or managers. It must be noted that because the Head of ADFIS reports to the Chief of the Defence Force, it is possible that an ADFIS decision to investigate could be overruled by the chain of command at the highest level.

d. In the UK, the Service police have control over the investigation and are subject to discipline by the relevant Provost Marshal and

not the operational chain of command. They are further required by the Queen's Regulations to investigate independently of the chain of command.

e. In Germany, the relevant civilian prosecutor will work together with military police on the investigation.

f. In the Netherlands, criminal investigations are conducted by the Royal Military Constabulary in accordance with the same rules applicable to the investigation of suspected criminal offenses by civilians, and in consultation with, and under the general supervision of, the Public Prosecution Service.

80. Oversight and Review

Most of the countries that were surveyed have some form of external oversight. In Canada, all military police are subject to the oversight of the Military Police Complaints Commission (MPCC), a civilian body with quasi–judicial status that was established in order to strengthen the accountability and independence of military police in relation to military police investigations; in Australia, the Inspector–General of the ADF (IGADF), who is independent of the ordinary chain of command, provides the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system and has the ability to expose and examine failures and flaws in the military justice system; in the UK, the Service police are subject to inspection by Her Majesty's Inspectorate of Constabulary (HMIC) to ensure that the standards of the Service police are broadly comparable to their civilian counterparts (i.e., independent and effective investigations).

How to Investigate?

81. This section will touch upon specific issues relevant to the Commission's analysis which relate to the standards of investigation.

1. Operational Debriefs

In all of the countries surveyed, in addition to administrative or criminal investigations, an operational review or debriefing is conducted after military operations. For example, in the US this is called an 'after action review' and in the Netherlands it is called an 'after action report'. Its purpose is to capture tactical, technical and operational lessons and generally it is a much more informal activity than criminal and administrative investigations. An operational review is conducted within the unit, by a commanding officer or a lower–ranking officer. The countries surveyed differ on whether statements made or information collected during a debriefing will trigger the reporting of an incident or form the basis for initiating either criminal or administrative investigations. For example, in the US an 'after action review' can trigger an investigation requirement. However, in Germany, operational debriefings have no impact on criminal investigations.

2. Separation of Advisory and Prosecution Functions

In the countries surveyed, there is a separation of advisory and prosecutorial functions, albeit to varying degrees.

a. In Germany and the Netherlands, countries which have no comprehensive system of military justice and rely on civilian prosecutorial authorities, there is necessarily an institutional separation between the personnel providing legal advice to the armed forces (for Germany, civilian lawyers within the Ministry of Defense, and for the Netherlands, the Military Legal Service of the Armed

Forces) and the civilian prosecutorial authorities.

b. Of the four common law countries with military justice systems, three (Canada, Australia and the UK) have moved over the years to create distinct prosecutorial authorities who have control of criminal proceedings. These prosecutorial authorities have guarantees of independence, flowing from their basis in statute and from specific provisions regarding their interactions with other officials and institutions. In Canada, the DMP is under the general supervision of the JAG, who also oversees advisory functions, but this supervisory relationship is subject to a number of formal constraints (for example, any instructions from the JAG concerning particular prosecutions, or prosecutorial policy in general, must be in writing and published). In Australia, although there is a Directorate of Operations and International Law (DOIL) and a Directorate of Military Justice overseeing advisory and military justice functions respectively, and both report to the Director–General of ADF Legal Services, prosecutorial decisions are taken by the DMP. In the UK, the Director of Service Prosecutions (DSP) is under the general supervision of the Attorney–General (although the Service Prosecution Authority are members of the Service legal branches), while the Service legal branches report to the Minister of Defence. As demonstrated, all but one of the countries surveyed had separate legal advisory and prosecutorial functions. In the US, a Judge Advocate may be responsible both for military justice matters and for operational legal advice.

3. Advice to Government

In the countries surveyed the legal branch of the armed services is not the exclusive source of advice to the government on law of armed conflict issues; the military legal branches will be consulted on such issues, but alongside legal advisers from other government departments (e.g., defense, the Attorney–General and foreign affairs).

4. Investigations into Civilian Deaths

In some countries, a factual investigation is conducted into all civilian deaths (absent any suspicion of an offense). This practice does not appear to be formally recorded in law or regulations, but in some cases it intersects with reporting obligations that have some formal basis in directives and instructions.

a. The US does not require such investigations. The other countries surveyed (Canada, Australia, Germany, the Netherlands, and, possibly, the UK in relation to shootings) require these investigations either as a matter of policy, or it has simply become invariable practice in theatres of operation. A factual investigation is conducted in any instance in which a civilian is killed (and in the case of the Netherlands, also when a civilian is seriously injured) by members of the country's armed forces, including incidences of collateral damage.

b. The factual investigations into civilian deaths are often carried out by individuals or institutions removed from, and independent of, the operational chain of command. (In Canada, the CFNIS is the investigatory body, at least until a determination can be made that no criminal/disciplinary culpability exists; in Australia, an Inquiry Officer is appointed from a different unit and sent to the area of operations; in Germany the military police and civilian prosecutorial authorities carry out the investigation; and similarly, in the Netherlands, the Royal Military Constabulary and the civilian prosecutorial authorities carry out the investigation).

CONCLUDING COMMENTS

82. A summary of the key points in this chapter demonstrates both divergences and similarities in the way the six countries surveyed have interpreted and applied their international humanitarian law obligation to investigate allegations of war crimes. The differences between the national systems are not surprising given that the relevant treaty obligations and standards of investigations lack specificity. The lack of uniformity is also explained by the fact that the comparator countries' investigation mechanisms are partly shaped by domestic law (common or civil law), operational and policy concerns and distinct military cultures. The countries that are Parties to the Rome Statute or to the European Convention on Human Rights carry additional obligations that influence their investigative processes. The numbers of military personnel deployed and the scope and number of investigations per year in the six countries varies greatly and this also influences distinct national institutions and processes. At the same time, there are many commonalities in the kind of domestic frameworks the countries have established to handle investigations into allegations of war crimes. In recent years, most of the countries have initiated institutional reforms to their investigation systems, and some trends that can be identified from these reforms include the 'reasonableness' threshold that triggers an investigation and the emphasis on independence as demonstrated by a separation from the chain of command or a move towards external oversight and review.

A comparative survey is a helpful tool for understanding the direction of best practice in this field as well as allowing countries to learn from each other about the kinds of processes that have been applied in order to adhere to the basic legal obligation to investigate in the context of armed conflict. Such knowledge is important when reviewing a military justice system and considering possible developments and reforms.

Chapter C: The Examination and Investigation Mechanisms in Israel Concerning Complaints and Claims of Violations of International Humanitarian Law

Introduction

1. This chapter is a survey of the examination and investigation mechanisms in Israel dealing with complaints and claims regarding violations of international humanitarian law. The survey in this chapter parallels the structure of the normative analysis in Chapter A: first, we will present the normative framework that gives rise to the duty to investigate violations as it is defined in Israel, whether according to Israel's international law obligations or according to Israeli law ('why investigate?'). Second, we will set out the normative provisions that define the violations that give rise to a duty to investigate under Israeli law, i.e., what are the offenses involving violations of international humanitarian law that are recognized by Israeli domestic law ('what to investigate?'). Third, we will present the Israeli examination and investigation mechanisms for complaints and claims regarding violations of international humanitarian law, which are raised against IDF soldiers, police officers, ISA workers, prison wardens and the civilian echelon ('who investigates?'). In the framework of this survey we will provide details about the legal authority of these mechanisms, the framework of their activity and their place in the general Israeli legal system, as well as the institutions that provide oversight and review of these mechanisms. Fourth, we will present the grounds for the initiation of an examination and investigation by the various mechanisms, including the reporting procedures ('when to investigate?'). Finally, we will survey the methods in which the examination and investigation processes are conducted by the various mechanisms ('how to investigate?').

The information surveyed in this chapter is based on information that was submitted to the Commission, including testimonies and documents that were submitted by the investigating mechanisms themselves; testimonies and documents that were submitted by other parties, such as human rights organizations; and on the independent assessment carried out by the Commission in which we inspected the examination and investigation procedures of a random sample of cases (see above in the introduction to this Report, paragraph 23).

A. Sources of the Normative Basis of the Duty to Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law in Israel ('Why Investigate?')

2. As stated in Chapter A, the duty to examine and investigate complaints and claims of violations of international humanitarian law is enshrined in various sources of international law. According to Israeli law, domestic law contains those provisions of customary international law that do not conflict with Israeli legislation. By contrast, a provision of conventional international law must be expressly adopted by the legislator. However, as a State Party, Israel is bound by the conventions in the international sphere. In the words of the Supreme Court:

> In Israeli law, a distinction is made with regard to the relationship between international law and domestic law, i.e., the need to decide the question whether a certain provision of international law has become a part of Israeli law, whether customary law or conventional law... According to the consistent case law of this court, customary international law is a part of Israeli law, subject to an act of Israeli legislation that contains a conflicting provision... "The law is that the rules of (customary) international law are automatically absorbed by Israeli law and constitute a part thereof, but in the event of a direct conflict between them and a statutory provision, the statutory provision prevails"... Regarding the status of conventional international law in relation to our law... the adoption of international conventions – in order to make them a part of domestic law and in order to make it possible to enforce them through the national courts – is contingent upon a prior act of the legislature... International conventions may constitute a declaration of existing customary law, but then what is stated therein will be binding by virtue of

> the aforesaid customary status of the rule included in them and not as a result of its inclusion in the convention.[1]

3. As stated in Chapter A, Israel is a State Party to the four Geneva Conventions.[2] Moreover, Israel has signed and ratified additional conventions that concern the rules of international humanitarian law.[3]

4. The general duty to examine and investigate violation of international humanitarian law also derives from the fact that Israel is a country that belongs to the community of nations and respects human rights. The Israeli Supreme Court has reflected this sentiment in many of its judgments. Thus, for example, the Court has stated:

> This warfare is not conducted in a normative vacuum. It is waged in accordance with the rules of international law, which lay down principles and rules for conducting warfare. The statement that "When the cannons roar, the muses are silent" is incorrect. Cicero's statement that *Inter arma enim silent leges* ("Among arms, the laws are silent") does not reflect modern reality. I discussed this in one case, where I said: "When the cannons roar, the muses are

1 HCJ 785/87 *Al Affo v. Commander of I.D.F. Forces in the West Bank*, 42(2) 4 (1988), at paras. 5(b)–5(c) of President Shamgar's judgment.

2 See: Chapter A, para. 5; It should be noted that Israel has also adopted the Protocol III Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005 (Israel's ratification came into effect in Nov. 22, 2007).

3 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954 (Israel's ratification came into effect in Jul. 1, 1958); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, Jun. 17, 1925 (Israel's ratification came into effect in Feb. 20, 1969); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 19, 1984 (Israel's ratification came into effect in Oct. 3, 1991); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects. Geneva, Oct. 10, 1980 (Israel's ratification came into effect in Mar. 22, 1995); Protocol on Non–Detectable Fragments (CCW Protocol I 1980) (Israel's ratification came into effect in Mar. 22, 1995); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby–Traps and other Devices (CCW Protocol II 1980) (Israel's ratification came into effect in Mar. 22, 1995); Protocol on Blinding Laser Weapons (CCW Protocol IV 1980) Oct. 13, 1995 (Israel's ratification came into effect in Oct. 30, 2000); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby–Traps and Other Devices as amended on May 3, 1996 (Protocol II to the 1980 Convention) (Israel's ratification came into effect in Oct. 30, 2000); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, May 25, 2000 (Israel's ratification came into effect in Jul. 18, 2005).

> silent. But even when the cannons roar, the military commander is liable to uphold the law. A society's ability to stand up to its enemies is based on its recognition that it is fighting for values that are worth protecting. The rule of law is one of those values" (HCJ 168/91 *Morcus v. Minister of Defense* 45(1) 467, 470).[4]

5. Apart from the international law obligation, in Israel there is a duty to investigate that derives from the rules of Israeli administrative and criminal law. For example, the Criminal Procedure Law [Consolidated Version], 5742–1982 (hereinafter: the Criminal Procedure Law), provides that: 'If the police become aware of the commission of an offense, whether as a result of a complaint or in any other way, they shall begin an investigation'. Similarly, the Investigation of Causes of Death Law, 5718–1958, also provides that 'when an individual dies and there is a reasonable basis for assuming... that the death was caused by an offense, ... the Attorney–General or his counsel, a police officer, a doctor or any interested person, may apply to a Magistrate judge... to investigate the cause of the death'.[5] The duty to investigate certain claims of violations of international humanitarian law is enshrined in Israeli law also by virtue of the recognition of the right to life as held by the Supreme Court:

> The actual investigation has ramifications for the protection of the right to life – the investigation first and foremost allows indictment in the appropriate cases, and imposing liability on those who deviate from the law. Moreover, a criminal investigation serves to safeguard the prospective aspect of the duty to protect life, in that it deters future perpetrators, prevents contempt for the right to life and contributes to the atmosphere of upholding the rule of law.[6]

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4 HCJ 3451/02 *Almandi v. The Minister of Defense, Mr. Benjamin Ben–Eliezer*, 56(3) 30 (2002), at para. 9 to President Barak's judgment [hereinafter: *Almandi* case].

5 The Criminal Procedure Law [Consolidated Version], 5742–1982, LA 1043, at Article 59 [hereinafter: The Criminal Procedure Law]; The Investigation of Causes of Death Law, 5718–1958, LA 242, at Article 19.

6 HCJ 9594/03 *B'Tselem – Israeli Information Center for Human Rights in the Occupied Territories v. the Chief Military Prosecutor* (still unpublished, Aug. 21, 2011), at para. 10 of president Beinisch's

Like any administrative authority, the prosecution and investigation authorities also have the duty to base their decisions on as broad and as precise a set of facts as possible.[7] Therefore, the decision to open an investigation as well as the decision to indict must be based on an examination and investigation.

6. The duty to investigate complaints and claims of violations of international humanitarian law by IDF soldiers also derives from the rules that apply to the activity of soldiers and regulate the normative framework in which they operate. Thus, the Military Justice Law, 5715–1955 (hereinafter: the Military Justice Law), states that 'a commander... or a soldier who knows or has basis to believe that another soldier committed an offense as stated, shall prepare a complaint or should instruct that a complaint be prepared about the offense' and shall submit the complaint to the investigation authorities,[8] and that 'a person cannot be committed for trial... until the offense was examined by an Examining Officer...' (an Examining Officer is an authorized Military Police Officer).[9] Moreover, IDF soldiers are subject to the Supreme Command Orders,[10] IDF General Staff Orders (hereinafter: General Staff Orders)[11] and orders and directives of various military units,[12] some of which concern the duty of commanders in the IDF to examine and investigate alleged violation of the law by those under their command.

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judgment [hereinafter: *B'Tselem* case].

7 HCJ 297/82 *Berger v. Minister of Interior*, 37(3) 29 (1983).

8 The Military Justice Law, 5715–1955, LA 189, at Article 225 [hereinafter: The Military Justice Law].

9 *Id.*, at Article 251.

10 Pursuant to the Military Justice Law, at Article 2A(a), the orders of the Supreme Command are 'general orders that will be issued by the Chief of Staff with the approval of the Minister of Defense, which will determine principles concerning organization, administration, rule and discipline in the army and ensuring its proper operation'.

11 Pursuant to the Military Justice Law, at Article 2A(b), orders of the General Staff are 'general orders issued by the Chief of Staff', on the matters mentioned with regard to orders of the Supreme Command.

12 Military Justice Law, at Article 3, provides that the orders of the Supreme Command, the orders of the General Staff and other general orders are regarded as laws, but in a case of conflict between the orders of the Supreme Command and the orders of the General Staff or other general orders, the orders of the Supreme Command will take precedence.

7. Another important source for the obligation to investigate is the rule that imposes responsibilities on commanders to investigate alleged violations of international humanitarian law. As was explained in detail in Chapter A, 'command responsibility' is binding customary law.[13]

In Israel, IDF soldiers and commanders are obligated 'to maintain the existence of discipline and compliance with the law and army orders and observe them meticulously'.[14] A special responsibility is imposed upon the commanders, since they are charged with the responsibility to enforce discipline upon their subordinates.[15] This special responsibility requires that every commander ensures that orders are complied with, to motivate his subordinates to fulfill their duties and to take prompt disciplinary measures in case an offense was committed.[16] This responsibility of the commander applies regarding the discipline of any soldier that is lower in rank that is present, in the absence of that soldier's commander.[17]

The Supreme Court has also addressed the issue of command responsibility, and held that commanders are obliged to prevent offenses and to punish perpetrators when they are committed, whether through personal example, as a model for imitation by soldiers in the field, or by imposing sanctions on soldiers who violated the rules, in a manner that sends a message that such conduct will not be tolerated.[18]

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13 See: Chapter A, para. 26. See also: Transcript of session no. 4 "Testimony of the Military Advocate–General" (Aug. 26, 2010).

14 SUPREME COMMAND ORDER 6.0302, *Discipline – Commander's Responsibility and Staff Responsibility*, at para. 1.

15 *Id.*, at para. 3.

16 *Id.*, at para. 5.

17 *Id.*, at para. 6. See, also: A/78/88 *First Sergeant Danino v. Chief Military Prosecutor*, CM 227, 239 (1988).

18 HCJ 7195/08 *Abu Rahme v. Brigadier–General Avichai Mandelblit, Military Advocate–General* (unpublished, Jul. 1, 2009) [hereinafter: *Abu Rahme* case].

B. The Normative Provisions in Israel that Define the Violations of International Humanitarian Law that Require Examination and Investigation ('What to Investigate?')

8. As stated above, there is a duty in Israel to investigate suspected violations of international humanitarian law. Below we will review the legal provisions underpinning the operation of the mechanisms responsible for the examination and investigation of the various security agencies. The provisions of the Geneva Conventions that impose a duty to punish persons who violate the conventions – and especially Article 146 of the Fourth Geneva Convention – have not been adopted by the Israeli legislator.[19] In Israel, according to the principle of legality, there needs to be an express provision of legislation that prohibits certain conduct in order for that conduct to be regarded as criminal. In the words of the Penal Law 5737–1977 (hereinafter: the Penal Law): 'There is no offense or penalty for it unless they are prescribed in statute or pursuant thereto'.[20] Therefore, the existence of a rule in customary international law and even Israel's obligations in international conventions are insufficient in themselves for commencing domestic criminal proceedings.

War Crimes

9. As stated in Chapter A, international law obligates States to enact legislation that enables punishing perpetrators of war crimes.[21] In Israel, the only explicit mention of the term 'war crime' in domestic legislation

19 It should be noted that on this matter draft legislation was tabled in the Knesset. See for example: P/682/18 draft Geneva Convention Law, 5769–2009. See also: Hillel Summer, *And Yet It Shall Surely Apply (On the Application of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, in Israeli Law)*, 11(2) TAU L. Rev. 263 (1986).

20 The Penal Law, 5737–1977, LA 864, at Article 1 [hereinafter: The Penal Law].

21 See: Chapter A, para. 24.

is in the Nazis and Nazi Collaborators (Punishment) Law, 5710–1950.[22] Section 1(b) of the law defines the term 'war crime' as follows: 'the murder of a civilian population of an occupied country or in an occupied country, their oppression or their deportation for the purpose of forced labor or for any other purpose; the murder and oppression of prisoners of war or of persons on the high seas; the killing of hostages; the theft of public or private property; the arbitrary destruction of cities, towns or villages; and destruction that is unjustified by military necessity'. However, the war crimes stipulated in Israeli law only relate to 'the period of the Second World War, in a hostile country'.[23]

10. In Israel, alleged war crimes are investigated by resorting to the offenses that are found in the Penal Law, which include, *inter alia*, the prohibitions of murder,[24] rape,[25] theft,[26] assault.[27] On this matter the Supreme Court held that:

> Indeed, in our legal system, indictments are filed in the military and civil courts, in appropriate cases, on the basis of Israeli law. In cases where the laws of war have been breached, indictments will be filed pursuant to Israeli law and for the appropriate criminal offense, which is, in principle, parallel to the same principles as those of international criminal law. In cases of this kind, the prosecution needs to prove the elements of the specific offense as in any other criminal trial.[28]

22 Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, LA 57. It should be noted that in addition to this law, Israel enacted The Law Regarding the Prevention and Punishment of the Crime of Genocide, 5710-1950, LA 137, which absorbs the Genocide Convention, which was adopted on 9 December 1948.

23 *Id.*, at Article 1(a).

24 The Penal Law, at Article 300.

25 *Id.*, at Article 345.

26 *Id.*, at Article 383.

27 *Id.*, at Article 378.

28 HCJ 3292/07 *Adalah – The Legal Centre for Arab Minority Rights v. Attorney–General* (still unpublished, Dec. 8, 2011) [hereinafter: *2011 Adalah* case]; See also: HCJ 10219/09 *Shurat HaDin Israel Law Center v. Attorney–General* (still unpublished, May 2, 2010).

11. The application of Israeli domestic law raises the question of the extraterritorial application of Israeli criminal law, since violations of international humanitarian law often occur outside the borders of the State. Indeed, the Israeli legislature extended the scope of application of criminal law beyond the territory of the State of Israel, insofar as there are certain links between the offender or the offense to Israel.[29] Thus, for example, the Extension of Emergency Regulations (Judea, Samaria and the Gaza Strip – Jurisdiction for Offenses and Legal Assistance) Law, 5728–1967,[30] gives the courts in Israel jurisdiction over offenses committed in Judea and Samaria (hereinafter: the West Bank), and until 2005 the Gaza Strip, by any person who is present in Israel and also offenses committed in the areas of the Palestinian Authority by an Israeli. The Penal Law provides that 'Israel's criminal law shall apply to an extraterritorial offense that is a felony or a transgression, which is committed by a person who at the time of its commission or thereafter was a citizen or resident of Israel' (an extraterritorial offense is an offense committed outside Israeli territory).[31]

12. Apart from the offenses set out in the Penal Law that allow prosecution for violations of international humanitarian law, IDF soldiers in regular service or reserve service are subject to a special law i.e., the Military Justice Law and relevant military orders.[32] The Military Justice Law also applies to civilians that are connected to the army (volunteers in the reserve forces, employees of the army, and any person who is lawfully held in custody by the army or to whom a weapon is entrusted by the army) that committed offenses from the moment they are enlisted until

29 See: the Penal Law, at Articles 13–17 (Article C – Application to Extraterritorial Offenses), which stipulate the offenses to which Israeli law applies extraterritorialy (including State security, offenses against the life of an Israeli citizen or against the life of a Jew, and obligations pursuant to international conventions to which the State of Israel is a Party); See also: CA 8831/08 *State of Israel v. Ashchara* (still unpublished, Jun. 30, 2010), at paras. 13–14 of Justice Amit's judgment.

30 Emergency Regulations Extension Law (Judea and Samaria and Gaza Strip – Trying of Offenses and Legal Assistance), 5727–1967, LA 905, as amended by the Emergency Regulations Amendment and Extension Law (Judea and Samaria – Trying of Offenses and Legal Assistance), 5772–2012. These Emergency Regulations will remain in effect until 30 June 2017.

31 The Penal Law, at Article 15; For the definition of an 'extraterritorial offense' see also: *Id.*, at Article 7.

32 The Military Justice Law, at Article 4.

their discharge, whether in the territory of the State of Israel or outside its territory.[33] The Military Justice Law 'imports' certain offenses from the Penal Law and applies them to the persons governed by the law,[34] and it also includes special penal provisions ('military offenses'). The military offenses include the prohibition of looting which is a 'war crime' under international law.[35]

One of the military offenses listed in the Military Justice Law deals with noncompliance with army orders.[36] This offense is important for our purposes because the four Geneva Conventions and the Convention for the Protection of Cultural Property in the Event of Armed Conflict, including its additional protocol, were incorporated into General Staff regulation 33.0133, according to which IDF soldiers are obliged to act in accordance with those Conventions.[37] It follows that a breach of the provisions of the Conventions constitutes an offense under General Staff regulations, and therefore also an offense under the Military Justice Law. Additionally, a violation of international humanitarian law can be indicted by way of offenses such as 'unbecoming conduct'.[38] It should be noted that it is possible to try certain offenses – such as unbecoming conduct or noncompliance with regulations – either in disciplinary proceedings or in a court martial; in the latter case they are considered, at least by the prosecution authorities, as more serious, even though currently they do not result in a criminal record.[39] Offenses of this kind have been defined by the Supreme Court as

33 The Penal Law, at Articles 4–11. In regards to the application of the law to an individual who has ceased to be a soldier, see: *Id.*, at Article 6.

34 The Military Justice Law, at Article 17.

35 *Id.*, at Article 74. For an example of the international status of the offence see Article 8(2)(b)(xvi) and Article 8(2)(e)(v) of the Rome Statute for the International Criminal Court.

36 *Id.*, at Articles 132–133.

37 CHIEF OF STAFF ORDER 33.0133 *Discipline – Conduct according to International Conventions to which Israel is a Party*.

38 For example, see: THE SAMPLE EXAMINATION, at para. 23 of the Introduction of this Report: File 38/09: which dealt with an incident where the force commander was indicted for 'unbecoming conduct' according to Article 130 of the Military Justice Law and exceeding authority to the level of endangering life and risking health (Article 72); See also: *Abu Rahme* case, *supra* note 18.

39 According to Article 17 of the Military Justice Law, military offenses are subject to Chapters A and B of the Preliminary Part of the Penal Law, and therefore they are subject to criminal records, with the exception of lesser felony offenses, which satisfy the conditions provided at Article 404A of the

'offenses of an open nature', which lie on the borderline between criminal law and disciplinary law, and are unique in that they indicate a breach of norms that does not imply that the perpetrator is a danger to society, but that he has harmed the military sphere.[40]

Responsibility of Commanders and Civilian Superiors

13. Once the rules of international humanitarian law were incorporated into army orders, every commander acquired the duty to prevent and repress violations of those rules by his subordinates. The duty imposed on commanders to punish persons who violate the law is considered by the army as a part of their duty to act as an example and role model. In the words of the Military Advocate–General (hereinafter: the MAG): 'The concept of command in the IDF implies a command responsibility and an educational and ethical obligation to discipline, decisively and clearly, someone whose conduct deviates from the standard of conduct expected of a soldier or commander of his rank'.[41]

Military Justice Law, which are mainly offenses that are punishable by a maximum of two months' actual imprisonment; See further on this subject the arguments of the MAG in *Abu Rahme* case, *supra* note 18, at paras. 22 and 26 of Justice Procaccia's judgment.

40 *Abu Rahme* case, *supra* note 18, at paras. 59–60 of Justice Procaccia's judgment.

41 The Military Advocate–General's Reply to the Petition in the *Abu Rahme* case, as cited in the judgment; See: *Abu Rahme* case, *supra* note 18, at para. 75 of Justice Procaccia's judgment.

C. The Mechanisms in Israel that Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law ('Who Investigates?')

14. In this section we will provide an overview of the mechanisms that examine and investigate complaints and claims of violations of international humanitarian law. Naturally, most of the claims relating to the examination and investigation mechanisms are focused on the IDF as the main security arm engaged in hostilities. Therefore, a substantial part of the discussion will be devoted to these mechanisms in the IDF. However, complaints and claims regarding violations of international humanitarian law can also be directed against other security arms, such as the Israel Police, the Israel Security Agency (hereinafter: the ISA), and the Israel Prison Service, regardless of whether the complaints relate to alleged acts committed in the West Bank or in Israel. Finally, claims of violations of international humanitarian law may also be directed against senior decision–makers, whether in the military echelon or in the civilian–political echelon. Below we will survey the manner in which the various arms conduct examinations and investigations of complaints and claims of international humanitarian law violations and the institutions that oversee their conduct and review them.

Complaints and Claims Directed at IDF Soldiers

15. The military justice system in Israel is responsible for examining and investigating complaints and claims regarding the conduct of soldiers. This system is composed of three main bodies that are responsible for administering law and order in the IDF: the MAG Corps, the Military Police Criminal Investigation Division (hereinafter: the CID) and the courts martial. Alongside the military justice system, certain claims against the

conduct of soldiers are also handled within the chain of command. In this framework, the operational debriefing is used. Below we will discuss both the operational debriefing and the way it interacts with the military justice system ('how to investigate?'). We will now outline consecutively the three examination and investigation bodies in the military justice system

1. The Military Advocate–General Corps

16. There are a number of orders that regulate the operation of the MAG Corps unit. The purpose, functions and structure of the MAG Corps are regulated in the Military Justice Law and in Supreme Command Order no. 2.0613, *The Military Advocate–General's Corps* (Mar. 15, 1976). In addition, the function of the MAG Corps is regulated in Supreme Command Order no. 2.0201, *The Professional Staff in the General Staff* (Aug. 1, 1966);[42] the Internal Regulations of the MAG's Headquarters, whose most recent version was adopted in December 2010;[43] and the Organizational Order of the MAG Headquarters, which was approved by the IDF's Planning Division in July 2008.[44]

The MAG Corps is designated to enforce law and order in the army, (with the exception of supervision and administration of the courts martial), to advise army authorities on matters of law and order, and to instill the values of the rule of law in the army.[45] The Organizational Order of the MAG Headquarters revised this purpose, and emphasized that 'the enforcement

42 SUPREME COMMAND ORDER 2.0613 *The MAG Corps* [hereinafter: SCO 2.0613]; SUPREME COMMAND ORDER 2.0201 *The Professional Staff in the General Staff* [hereinafter: SCO 2.0201].

43 The internal orders of the MAG Corps [hereinafter: Internal orders of the MAG Corps] have the status of unit standing orders that bind all of the persons serving in the unit; See:
www.law.idf.il/Templates/GetFile/GetFile.aspx?FileName=D:\projects\patzar–ks\data\Sip_storage\FILES\0\940.pdf.

44 *The Organizational Order of the MAG Corps* (approved by the Planning Department, 2008) [hereinafter: *the Organizational Order*]; The Organization Order has no special normative status, and it only binds the Planning Department of the IDF, which is responsible, *inter alia*, for formulating the IDF's organizational policy, including determining the designation, duties and main structure of each unit.

45 SCO 2.0613, *supra* note 42, at para. 2.

of law and order, and the legal advice given by the MAG Corps, constitute an integral part of the IDF's ability to carry out its assignments'.[46]

The duties of the MAG Corps include managing the military prosecution system at the courts martial; maintaining the Military Defender's Office in order to provide a legal defense for soldiers; advising branches of the military in all spheres of law (in the fields of military law, international law and the law of armed conflict), and also to represent them where needed; maintaining law and order in the territories administered by the IDF (*inter alia*, maintaining a prosecution system in the West Bank); supervising disciplinary law in the army; developing, teaching and instilling military law among IDF soldiers and commanders; and handling all legislative issues relating to the army (both by initiating legislative amendments and by handling draft legislation, while coordinating the legislative proceedings taking place in government agencies and in the Knesset).[47]

17. The MAG is the commander of the MAG Corps. According to the Military Justice Law, the MAG is authorized to act as adviser to the Chief of Staff of the IDF and all other military authorities on all issues of law and justice;[48] to supervise the rule of law in the army, except for supervision and management of the courts martial; to be responsible for legal supervision of disciplinary proceedings; and to carry out every other function imposed on him in accordance with every law and army regulations.[49] Moreover,

46 *The Examination and Investigation Mechanisms in Israel for Complaints and Claims Raised Regarding Breaches of the Laws of War* (Position Paper of the MAG Corps submitted to the Turkel Commission, Mar. 29, 2011) 3–4 [hereinafter: *MAG Position Paper regarding the Examination Mechanisms*].

47 SCO 2.0613, *supra* note 42, at para. 3; *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, at 4.

48 See: SCO 2.0613, *supra* note 42, at para. 4; The Military Justice Law, at Article 178; It should be noted that these duties are defined in SCO 2.0201, *supra* note 42, at paras. 34–38; See also: INTERNAL ORDER OF THE MAG CORPS 01.01 *The Military Advocate–General and his Office – Duties and Powers*, *supra* note 43. This power is enshrined also in SCO 2.0613, *supra* note 42, at para. 4.

49 Thus, for example, according to Article 317 of the Military Justice Law the MAG is a member of the committee for approving lawyers who may act as defense counsel in the courts martial.

the MAG is competent to order the holding of a preliminary investigation when he is of the opinion that an offense indictable by a court martial has been committed, to order the opening or closing of a criminal investigation and to order supplementry investigations to be carried out.[50] It should also be noted that the opinion of the MAG is binding upon the army, since 'it determines, for the IDF and its agencies, the current legal position'.[51]

18. The MAG is appointed by the Minister of Defense, upon the recommendation of the Chief of Staff.[52] The MAG's tenure is not defined.[53] When the current MAG was appointed, on 15 September 2011, the Chief of Staff and the Minister of Defense agreed to appoint him for a four–year term of office and to determine in advance the date of his promotion to the rank of Major–General.[54] From a professional point of view, the MAG is subordinate to the Attorney–General, who stands at the head of the legal system of the executive branch of government in Israel, including the prosecutorial and law enforcement system (for a discussion on the relationship between the MAG and the Attorney–General, see below in paragraphs 62–63). It should be noted that in material submitted by the MAG to the Commission, he clarified, that according to military orders, while he is subordinate to the Chief of Staff in rank and he is a part of the professional staff on the General Staff, 'he is only subject to the authority of the law'.[55] The MAG further stated that 'the professional independence of the MAG is not limited solely to the person holding that office, but reflects the professional independence of the MAG Corps as a whole'.[56]

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50 *Id.*, at Articles 178(4)–178(5).

51 SCO 2.0613, *supra* note 42, at para. 13.

52 The Military Justice Law, at Article 177(a).

53 For example, the last MAG served for approximately eight years and his predecessor served for approximately four and a half years.

54 Letter of Colonel Hod Batzar, assistant to the Chief of Staff, to Hoshea Gottlieb, the Commission's Coordinator, *The Status of the Military Advocate–General* (Nov. 10, 2011).

55 See: SCO 2.0613, *supra* note 42, at para. 9(a); A similar order can be found in: SCO 2.0201, *supra* note 42, at para. 7(a)(7); See also: *Position Paper of the MAG Corps submitted to the Turkel Commission* 66 (Dec. 19, 2010) [hereinafter: *MAG Position Paper 2010*].

56 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, at para. 6.

19. Another significant figure in the MAG Corps is the Deputy MAG, who is appointed by the Chief of Staff on the recommendation of the MAG.[57] The Deputy MAG, who is an officer with the rank of colonel, acts as the chief of staff of the MAG Corps, and his duties include assisting the MAG in exercising his powers according to the law, replacing the MAG in his absence, managing the work of the MAG Corps Headquarters, and exercising the powers given to him by law and army regulations or delegated to him by the MAG.[58]

20. For the purpose of discharging their duties, the MAG and his deputy are assisted by officers of the MAG Corps, who are IDF officers with legal education and training.[59] In the Organizational Order of the MAG's Headquarters, it is provided that 'an officer in the MAG Corps, with the exception of the Military Defender, is subordinate in carrying out his duties solely to the MAG, and not to the commander to whom he provides a legal service'.[60] Similarly, also the military advocates in the various jurisdiction districts[61] are not in their professional capacity subordinate to the district heads (i.e., to the General of Command or the Force Commander), but only to the MAG.[62]

21. In terms of institutional structure, the MAG Corps is made up of three professional systems: a law enforcement system (composed of the military prosecution and the Military Defender's Office); a legal advice

57 The Military Justice Law, at Article 177(b).

58 *Id.*, at Article 178A(a); SCO 2.0613, *supra* note 42, at para. 6; INTERNAL ORDER OF THE MAG CORPS 01.02 *The Deputy Military Advocate–General and his Office – Duties and Powers*, *supra* note 43. It should be noted that the structure of the MAG Corps has undergone several significant changes in recent years, some of which will be considered below. Therefore, SCO 2.0613, *supra* note 42, at para. 8, which lists the main bodies in the MAG Corps, no longer reflects the current position, and it will be changed in the future in the amendment to the Supreme Command Orders.

59 See: the Military Justice Law, at Article 178; SCO 2.0613, *supra* note 42, at para. 5.

60 SCO 2.0613, *supra* note 42, at para. 11, provides that the Chief Military Defender shall not be subject to the authority of his commanding officers when he carries out his duties, and he shall be guided solely by the best interests of the defendant.

61 In the IDF there are nine jurisdiction districts, which coincide with the geographic or functional commands.

62 SCO 2.0613, *supra* note 42, at para. 10.

system (composed of the Advice and Legislation Department, the Legal Adviser for the Territories of Judea and Samaria, and the International Law Department); and the training and research system, of which the center is the Military Law School. In addition to these three systems, there is an Audit, Internet, Complaints and Information Unit, as well as other administrative divisions and units.[63]

It should be noted that the separation between the law enforcement system and the legal advice system is a consequence of an organizational change that took place in the MAG Corps in 2007. Following this change, the military advocates in charge of the prosecution teams no longer engage in the provision of legal advice to the heads of the jurisdiction districts in which they operate, but the legal advice to the various army entities is provided solely by the departments of the legal advice system.[64] Below the Commission will discuss in detail the structure and operation of these three professional systems, i.e., the law enforcement system, the legal advice system and the training and research system.

A. The Law Enforcement System

22. As noted above, two of the units that compose the law enforcement system are the military prosecution and the legal defense. The head of military prosecutions is the Chief Military Prosecutor (hereinafter: the CMP), an officer with the rank of colonel, who is responsible for the military advocates and gives them professional guidance. His duties are listed in the internal regulations of the MAG Corps, and they are mainly to assist the MAG and his deputy in exercising their powers in the criminal sphere; to carry out the functions that have been imposed on him according to any law and under army regulations, with regard to examination,

63 See: Internal order of the MAG Corps 01.04 *The Military Prosecution – Structure, Mission and Duties*, *supra* note 43.

64 This separation is incorporated in *The Organizational Order*, *supra* note 44, and in internal instructions by the MAG. The division was also adopted into the draft amendment of SCO 2.0613, *supra* note 42.

investigation, arrest and trial proceedings; to oversee the teams of the military prosecutions in both the courts martial and the military courts in the West Bank; to supervise the activity of prosecution teams and to give them professional guidance; to determine a uniform and coordinated prosecution policy in various fields; and to advise and assist in training and instruction by the Military Law School on matters relating to the sphere of military prosecutions.[65] The CMP is also responsible for supervising the CID, giving them professional guidance, and ordering them to open investigations and carry out or complete examinations.

23. Three advocates with the rank of lieutenant–colonel serve as the MAG's representatives in the respective jurisdictional districts for all law enforcement issues and investigation and trial proceedings in the army.[66] An additional military advocate is responsible for the investigation and prosecution proceedings in the military courts in the West Bank (the Judea and Samaria Advocate). The military advocates are professionally subordinate to the MAG and they are subordinate to the CMP in the chain of command and professionally, but, as stated above, they are not subordinate to the head of the jurisdiction district (the District Commander or the Force Commander).[67]

24. Additionally, there are four teams within the MAG Corps that are headed by military advocates and that are authorized to handle specific issues. These teams are the MAG Corps for Special Tasks, the MAG Corps

65 INTERNAL ORDER OF THE MAG CORPS 01.04 *The Military Prosecution – Structure, Mission and Duties*, *supra* note 43.

66 *Id.*, at para. 23; At paras. 31–33, it is provided that a Military Advocate of the Central Command will also act as the Military Advocate of the Air Force jurisdiction district, the Chief of Staff jurisdiction district and the Home Front jurisdiction district; that the Military Advocate of the Southern Command will also act as the Military Advocate of the Land Forces Command; and the Military Advocate of the Navy shall also act as the Military Advocate of the Northern District. The main duties of the Military Advocate are also listed in that order (see para. 24).

67 INTERNAL ORDER OF THE MAG CORPS 01.04 *The Military Prosecution – Structure, Mission and Duties*, *supra* note 43, at para. 29.

for Operational Matters, the MAG Corps for Absentees and Deserters, and the MAG Corps for Traffic Issues.[68]

25. Of these four teams, the one of particular relevance for our purposes is the MAG Corps for Operational Matters, which was established in 2007. This team specializes in handling cases relating to incidents that occurred during military operations and cases concerning training accidents. It should be noted that before this team was established, complaints and claims regarding breaches of law during operational activity, including assistance for investigations by the CID and for the indictment proceedings that followed them, were examined by the prosecution teams in the jurisdiction districts, in addition to the other offenses they were responsible for handling.[69]

The functions of MAG Corps for Operational Matters include: the review of operational debriefings in order to decide whether to order the CID to open an investigation; advising the MAG and the International Law Department with regard to the definition of the rules of engagement (together with other advisory bodies);[70] handling examination and investigation files for offenses arising from operational activity of the IDF, and offenses of IDF soldiers that are committed against a civilian population in a territory administered by the IDF or during combat; and handling complaints of civilians and organizations regarding offenses of IDF soldiers in the aforementioned fields.[71]

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68 The Traffic Division is headed by an officer of the rank of major.

69 See: *Activity Report for the 2007 Work Year* 17–18 (Annual Report of the Military Advocate–General's Headquarters, 2007), *available at:* www.law.idf.il/sip_storage//FILES/3/393.pdf [hereinafter: *2007 MAG Activity Report*].

70 It should be noted that according the letter of Major–General Avichai Mandelblit, the MAG, to Hoshea Gottlieb, the Commission's Coordinator 2 (Aug. 9, 2011) the involvement of the MAG Corps for Operational Matters in the drafting of the rules of engagement focuses on advice regarding the enforcement aspect. Its involvement is intended to ascertain that the rules are drafted sufficiently clearly so that in the event of a deviation it will be possible to establish disciplinary or criminal liability and to present to the drafters lessons that were learned from past incidents relating to the manner of drafting the rules of engagement, and to verify their assimilation in the new rules.

71 *The Organizational Order*, *supra* note 44, at para. 5.7.

Within the MAG Corps for Operational Matters, there are approximately ten military advocates and the Corps is headed by the Military Advocate for Operational Matters with the rank of lieutenant–colonel and his deputy with the rank of major.[72] The advocates that serve in this team, like the advocates of the other teams, have (at least) a first degree in law and have passed an officers' course as well as a legal officers' course.[73] During the process of absorbing and training them, the advocates also receive training on legal issues that are relevant to the team's work, from, amongst others, the Military Advocate for Operational Matters and his deputy. In addition, the advocates periodically receive professional training during their service in the team, such as study days together with the CID, special operational study days, study tours of operational units and training from professional army personnel. The MAG Corps for Operational Matters also holds study days with the participation of commanders of CID bases and with investigators in cases involving violations of international humanitarian law, in order to improve the handling of cases and to learn lessons for the future.[74]

26. The second unit that comprises the law enforcement system is the Military Defender's Office, whose purpose is to provide legal representation to IDF soldiers who have been or may be ordered to stand for criminal trial in a court martial.[75] The right to representation applies to the whole proceeding, from the investigation stage until the proceedings after the main trial, for example, proceedings before the Discharge Board or the Parole Board. The head of the Military Defender's Office is the Chief

72 *2007 MAG Activity Report*, *supra* note 69, at 5–8.

73 Legal officers' course trains the interns, who have finished academic legal studies, to become familiar with the spheres of activity of the Military Advocate–General's Corps. The course, which lasts two months, is divided into three main parts: the criminal part – studying the military law enforcement system, which incorporates the theoretical aspect in practical workshops; the advice part – which includes becoming familiar with the advice departments at the MAG Corps; and familiarity with the IDF – which includes visits to various IDF bases and becoming familiar with the commanders in the field.

74 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 2 [hereinafter: SID annex].

75 The main duties of the Military Defender's Office are set out in INTERNAL ORDER OF THE MAG CORPS 01.03 *Military Defender's Office – Structure, Mission and Duties*, *supra* note 43.

Military Defender (hereinafter: the CMD), who is an officer with the rank of colonel, and who is defined, according to the internal regulations of the MAG's Headquarters, as the assistant to the MAG for matters concerning the Military Defender's Office.[76] However, like any military defender, in carrying out his duties, the CMD is not subordinate to the MAG and he is guided solely by the best interests of the defendant.[77] In this context it should also be noted that apart from the CMD, the military defenders carry out their duties in civilian clothes and not in army uniform, with the aim of improving the degree of confidence in the Military Defender's Office.[78] The Military Defender's Office is divided into four units: the CMD's Office and three command teams that correspond with the jurisdiction districts of the MAG Corps – the Southern Command and the Land Forces Headquarters, the Northern Command and the Navy, and the Central Command, which includes the Chief of Staff units, the Air Force and the Home Front.

B. The Legal Advice System

27. The second professional system within the MAG Corps is the legal advice system which is made up of three departments: the Advice and Legislation Department, the Legal Advisor for Judea and Samaria and the International Law Department. Each of the departments is headed by an officer with the rank of colonel, who is subordinate to the MAG professionally and in the chain of command. The Advice and Legislation Department is responsible for giving legal advice to the army in all spheres of activity and areas of law, except for the issues that have to do with 'the administered territories and international law' which are handled by the two dedicated departments. The Advice and Legislation Department is also responsible for formulating the IDF's legal position on draft legislation, both by initiating legislative amendments and by handling legislative

76 The Chief Military Defender is appointed by the Chief of Staff, on the recommendation of the MAG; See: the Military Justice Law, at Article 182.

77 SCO 2.0613, *supra* note 42, at para. 11.

78 INTERNAL ORDER OF THE MAG CORPS 01.03 *Military Defender's Office – Structure, Mission and Duties*, *supra* note 43, at para. 15.

proposals, in coordination with the legislative proceedings taking place in Government bodies and the Knesset.[79]

28. The Legal Advisor for Judea and Samaria gives legal advice to army units operating in the West Bank and acts to strengthen the rule of law and order there, in cooperation with the other security and law enforcement agencies operating in the West Bank; determines the binding interpretation of the law and security legislation in the West Bank; carries out legal administrative work and drafts and publishes legislation in that territory.[80]

29. The International Law Department gives legal advice in the field of international law and incorporates into the army Israel's international law commitments. This department also acts as an information center and assists members of the civil service (i.e., non–military personnel) in the fields of international law relating to military and security operations.[81] The department's functions are listed in the Internal Regulations of the MAG Corps, and they include advising all military agencies in all areas of international law, while determining the binding interpretation of its rules; acting as a part of the MAG Corps general staff with regard to the fields of international law; giving professional guidance to all the units of the MAG Corps in the fields of international law; advising IDF units with regard to operational activity during times of emergency and calm, including formulating a legal position on methods of warfare, operational plans and military targets; and advising IDF units and other parties in the civil service on political negotiations and political agreements between the State of Israel and Arab countries and the Palestinians, and

79 INTERNAL ORDER OF THE MAG CORPS 01.05 *The Advice and Legislation Department – Structure, Mission and Duties*, *supra* note 43.

80 INTERNAL ORDER OF THE MAG CORPS 01.06 *The Legal Advisor for Judea and Samaria – Structure, Mission and Duties*, *supra* note 43.

81 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, at 8–9.

even participating in political negotiations and on committees for the implementation of international agreements that relate to the IDF.[82]

C. The Training and Research System

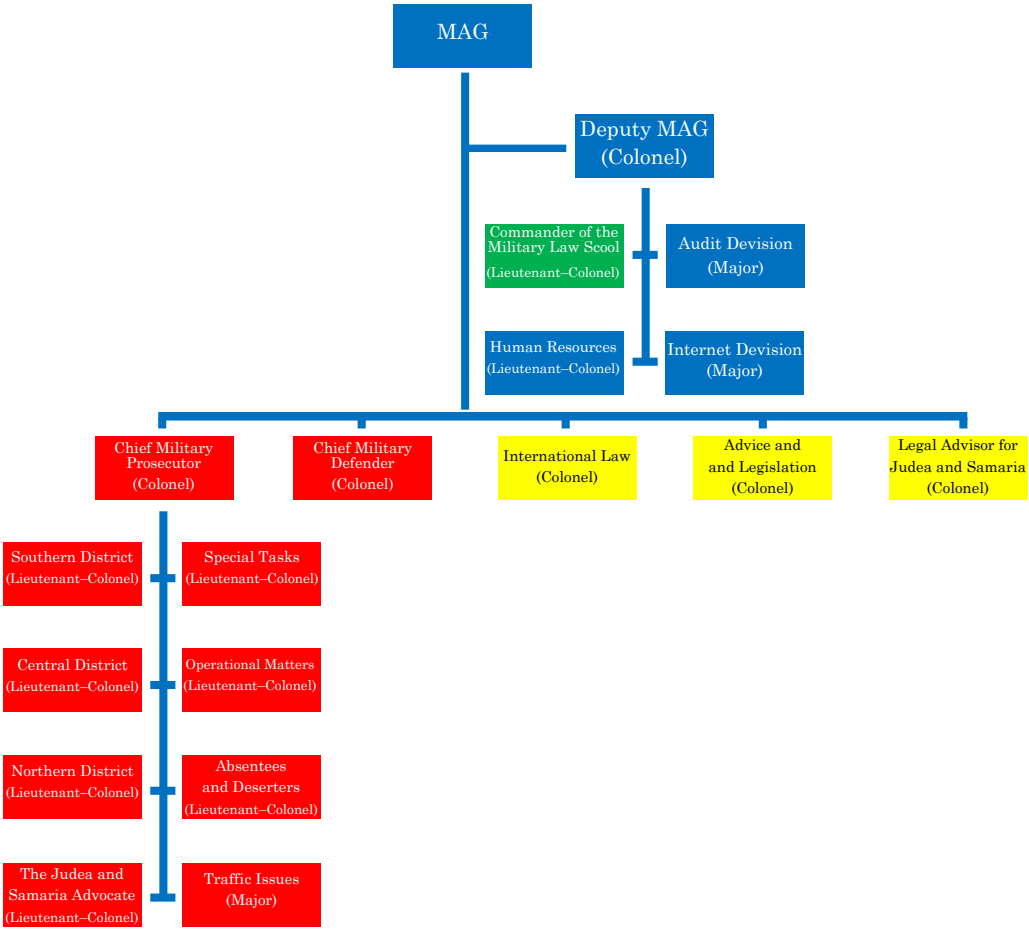
30. The third professional system in the MAG Corps is the training and research system whos central organ is the Military Law School. This school acts as a professional center in the IDF for training and research in the field of military law.[83] The commander of the Military Law School is an officer with the rank of lieutenant–colonel, who is subordinate to the Deputy MAG professionally and in the chain of command.

The Military Law School has several departments, including the Criminal Law Department, the Disciplinary Law Department and the International and Civil Law Department. The subjects studied in the International and Civil Law Department include public international law, such as the law of armed conflict including the legality of combat methods; the rules of conduct in combat operations and routine security operations; international criminal responsibility; prisoners of war and detainees; belligerent occupation and human rights. Officers in the department give lectures in training programs to commanders on all levels, including in a combat personnel course, academic courses at the Tactical and Naval Command College, officers' courses, courses for coordination and liaison officers, border commanders, etc.[84]

82 INTERNAL ORDER OF THE MAG CORPS 01.07, *The International Law Department – Structure, Mission and Duties*, *supra* note 43.

83 INTERNAL ORDER OF THE MAG CORPS 01.08 *The Military Law School – Structure, Mission and Duties*, *supra* note 43.

84 See further on this issue: www.law.idf.il/455–he/Patzar.aspx#paragraph_2.


MAG
Deputy MAG (Colonel)
Commander of the Military Law Scool (Lieutenant–Colonel)
Audit Devision (Major)
Human Resources (Lieutenant–Colonel)
Internet Devision (Major)
Chief Military Prosecutor (Colonel)
Chief Military Defender (Colonel)
International Law (Colonel)
Advice and and Legislation (Colonel)
Legal Advisor for Judea and Samaria (Colonel)
Southern District (Lieutenant–Colonel)
Special Tasks (Lieutenant–Colonel)
Central District (Lieutenant–Colonel)
Operational Matters (Lieutenant–Colonel)
Northern District (Lieutenant–Colonel)
Absentees and Deserters (Lieutenant–Colonel)
The Judea and Samaria Advocate (Lieutenant–Colonel)
Traffic Issues (Major)

2. The Military Police Criminal Investigation Department

31. The second main body responsible for administering law and order in the IDF is the Military Police which is comprised of four systems: the CID – which is the main system we will focus on, the traffic enforcement system (which corresponds to the Traffic Division in the Israel Police); the imprisonment system (which corresponds to the Israel Prison Service); and the security check system (at border crossings around Jerusalem[85] and in the West Bank).[86]

32. The CID has the authority to carry out investigations in the IDF in the criminal sphere, including road accidents. CID's activity is regulated in the Military Justice Law, in General Staff Order 33.0304, and in Order 5000 of the Chief Military Police Commissioner (hereinafter: the CMPC), and its purpose is to enforce the law, prevent offenses and eradicate crime. In order to carry out its duties, the CID is entitled to investigate any person (including civilians) and to take possession of any object that is required for the investigation.[87] The CID has independent authority to open a criminal investigation for offenses that were committed in a military context or that were committed by someone who is subject to the Military Justice Law.[88] Apart from the CID only the MAG and the military advocates are entitled to order the opening of an investigation.[89] All of the officers in the CID are not subordinate to external authorities but only to their direct commanders in the unit, in the chain of command up to the commander of the CID himself.[90] It should also be

85 The area around Jerusalem includes the towns near the route of the separation barrier in the Jerusalem area.

86 Transcript – Part B, session no. 7 "Testimony of the Chief Military Police Commissioner" 2 (Apr. 14, 2011) [hereinafter: *CMPC's Testimony*].

87 The Military Justice Law, at Article 256.

88 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 2.

89 General Staff Order 33.0304 *CMPC's Inspection and Investigation* [hereinafter: General Staff Order 33.0304]

90 Chief Military Police Commissioner Order 5000 *Definition of Officers in the CID and their Powers* [hereinafter: *CMPC Order 5000*]. The order was last revised in February 2007.

emphasized that the professional guidance for the CID is given by the MAG and the military prosecution.[91]

33. The CID is headed by a commander with the rank of colonel, who is subordinate in the chain of command to the CMPC and acts as his deputy in the sphere of investigations in the IDF.[92] Apart from being in charge of the unit, the CID Commander recommends to the MAG candidates to serve as CID investigators; he is in charge of improving the professionalism of CID investigators; and he is competent to order the opening of criminal investigations and to recommend to the MAG or military advocates the opening or closing of an investigation.[93]

34. The sub–units and officers that are subordinate to the CID Commander are: three district commanders (Northern, Central and Southern); the Special Investigations Unit Commander; the National Fraud Investigations Unit (hereinafter: the NFIU) Commander; and the head of the Intelligence and Detection Division.[94]

The District CID units handle the main day–to–day work of the CID, including investigations regarding violations of international humanitarian law.[95] Each unit is headed by a District CID Commander (Investigating Military Police Commander, hereinafter: the IMPC), who is responsible for enforcement of the law in IDF units that operate in the district under his command.[96] The IMPC has under his command a district investigations unit (the Investigating Military Police base), a district road accidents investigations base (which deals with road accidents in that district) and a central investigations unit, which deals with special and

91 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 2.

92 See: *CMPC Order 5000*, *supra* note 90, at para. 3.

93 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 3.

94 *CMPC Order 5000*, *supra* note 90.

95 *Id.*, at paras. 34–36.

96 *Id.*, at paras. 32–33.

sensitive investigations, including the smuggling and theft of weapons and ammunition on small scales, serious drugs cases, forgery of documents and additional sensitive cases.[97]

35. The Central Special Investigations Unit (hereinafter: the CSIU) centralizes the most sensitive and complex investigation abilities that rely on advanced technology, and make use of special intelligence sources.[98] These services are provided by the CSIU to all CID units, and also harnesses its abilities for the purpose of investigating sensitive and special criminal targets, such as soldiers suspected of dealing in drugs or weapons, or assisting the enemy, etc. Investigations are referred to this unit at the discretion of the CID Commander.

36. NFIU was established in May 2000 (the unit replaced a special investigation team that operated within the CSIU) in order to handle fraud offenses that are carried out by IDF soldiers, including large scale thefts (of gasoline, army equipment etc.), money laundering, forgery that gives rise to an economic benefit, bribery, breach of trust, etc.[99] The NFIU operates with a national deployment and carries out intelligence and evaluation services that are unique to fraud offenses and economic crime. Within the framework of the NFIU there is a sub–unit for computer offenses and searches of computer material, which has at its disposal advanced technological machinery and acts as an expert in this field for all the CID units.[100] This sub–unit is also responsible for the training of investigators for computer offenses. It should be noted that the sub–unit carried out a central role in investigation of offenses of theft that were committed within

97 *Id.*, at paras. 36–37. It should be noted that in the Central District and the Southern District there are already such central units, whereas in the Northern District there is a special investigating team.

98 *Id.*, at paras. 22–29.

99 *Id.*, at paras. 30–31 (At this stage the order has not yet been updated and the Fraud Department is defined within the framework of the CSIU. See: *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 4, Fn.14).

100 *Id.*, at paras. 41–42 (at this stage *CMPC Order 5000* defines the sub–unit as the 'Head of the Computer Division'. See: *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 4, Fn.15).

the framework of the maritime incident of 31 May 2010, on the deck of the *Mavi Marmara*, and the searches that were carried out on computers and cellular telephones which revealed evidence that implicated the suspects in the offenses.[101]

37. The final sub–unit subordinate to the CID Commander is the Intelligence and Detection Division, which coordinates the activity of obtaining intelligence and detection services for the whole of the CID.[102] The division constitutes a professional authority for making use of intelligence as well as locating sources and operating them, and it trains and employs intelligence coordinators and detectives that serve the whole of the CID. In addition, the division coordinates the databases to which the Military Police has access (the Criminal Register, the Ministry of the Interior Register, etc.) and it is responsible for enhancing investigations of the CID. In order to guarantee the quality of the intelligence sources and information, the head of the Intelligence and Detection Division conducts periodic audits of the work of the intelligence coordinators working under him.

38. Another aspect of the CID that must be noted is the training given to its investigators. According to the testimony of the CMPC before the Commission, CID investigations are carried out by investigators who have received several months of professional training, including six weeks of basic training and initial qualification and a ten–week basic course, which takes place at the Military Police Professions School.[103] During the course, the participants also receive legal training from the MAG Corps, and they are authorized to perform their duties as CID investigators by the MAG.[104] At the end of the course, the graduates spend three months in field work,

101 For full details of Investigating Military Police investigations that were opened following the incident, see: *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission* Report Part One, at para. 160 (2011) [hereinafter: The Commission's First Report].

102 *CMPC Order 5000*, *supra* note 90, at paras. 14–15.

103 *CMPC's Testimony*, *supra* note 86, at 23.

104 Military Justice Law, at Article 252(a)(3); See also: *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 3.

during which the junior investigators are trained by senior investigators. At the end of the training period, the trainees return to the Military Police Professions Training Base for two weeks of advanced training. In addition, all CID investigators are required to participate in special study courses throughout their service and to pass professional fitness tests each month.

3. The Courts Martial

39. The third main body within the military justice system responsible for administering law and order in the IDF is the courts martial system. The courts martial system is the 'judicial branch' of the military legal system. The structure of the system and the powers of its courts are set out in the Military Justice Law[105] and Supreme Command Regulation no. 2.0612, *The Courts Martial Unit* (Jul. 15, 1966). The courts martial system includes district courts martial (which are divided according to geographical jurisdiction or functional jurisdiction), special courts martial (which adjudicate matters concerning officers with the rank of lieutenant colonel and above), and the courts martial for appeals (which hears appeals on district and special courts martial).[106]

According to the Military Justice Law, the courts martial have jurisdiction over offenses committed by IDF soldiers in regular service and reserve duty.[107] The jurisdiction of the courts martial is personal, and it extends to offenses committed by soldiers anywhere, either in war or peacetime.[108] The court's jurisdiction applies both to offenses defined in the Military Justice Law[109] and to other offenses defined in general Israeli legislation. The jurisdiction of the courts martial with regard to

105 Military Justice Law, at Chapter 2 of Part four – 'Courts Martial'.

106 *Id,* at Chapter 5 – 'Appeal'.

107 *Id.*, at Articles 7–10; Furthermore, the Military Justice Law applies the jurisdiction of the courts martial to anyone who is lawfully in the custody of the army, anyone working in the army's employment or as its agent, and prisoners of war.

108 *Id.*, at Articles 13–14.

109 For the definition of 'military offenses', see: *Id.*, at Article 1.

non–military offenses is not exclusive, and the civil courts have parallel jurisdiction. For the purposes of such offenses, the military prosecution determines which judicial system, military or civil, will commit a suspect to trial, when the main criterion that guides it is the extent of the connection between the offense and the military service.[110]

40. The principle of the independence of court martial judges is a basic principle set out in the Military Justice Law: 'in matters of administering justice, a military judge is subject to no authority other than the authority of the law, and he is not subordinate to any authority of his commanders'.[111] The head of the courts martial system is the President of the appeals court martial, who is competent to determine the rules of procedure in the courts martial and supervise their activity, and he also serves as the commander of the courts martial.[112] The President of the appeals court martial, like all the courts martial judges, is appointed to his position by the President of the State, after selection by a committee that includes civilians and army personnel and that is headed by the Minister of Defense.[113] The appointment is for a fixed period, but the selection committee may recommend an extension for additional periods.[114] Termination of office, without the judge's consent, is limited to certain grounds and is effected according to a decision of a special disciplinary tribunal or the selection committee.[115] In addition to the regular judges, the courts martial also have judges that are not jurists, called 'military judges', who are appointed to their position upon the recommendation of the President of the court martial in which

110 The Attorney–General is competent to order the transfer of a trial of a non–military offense from the courts martial to the civil jurisdiction system, if he is of the opinion that the offense was not committed within the framework of the army or as a result of the defendant's being in the army (*Id.*, at Article 14).

111 *Id.*, at Article 184.

112 SCO 2.0612 *The courts martial unit*, in paras. 1–2.

113 Articles 186–197 of the Military Justice Law; Pursuant to Article 187, the members of the committee for selecting judges are: the Minister of Defense, who holds the position of chair of the committee, the Minister of Justice, the President of the Supreme Court, a justice of the Supreme Court selected by his fellow–justices, a representative of the Israel Bar Association who is selected by its National Council, the Chief of Staff, the Head of Manpower at the IDF General Staff, the President of the appeals court martial and a judge of the appeals court martial determined by its President.

114 *Id.*, at Article 192.

115 *Id.*, at Article 192C.

they serve. According to the provisions of the Military Justice Law, a bench of a district court martial or a special court martial is made up of three or five judges, of whom at least one is a 'military judge' and at least one is a 'jurist judge';[116] a panel of the appeals court martial will always have a majority of 'jurist judges'.[117]

41. A final point to complete this survey of the military justice system, is that in the West Bank there is a *military court system* comprised of a court of first instance and a court of appeals, which operates according to an order.[118] The Military Court in the West Bank is authorized to try civilians for any offense that is defined as such in the law and security legislation.[119] In that way it is different from the courts martial which only try offenses committed by soldiers and those individuals subject to the Military Justice Law.[120] In general, the Military Court is competent to try any offense committed in the West Bank, even if the perpetrator of the offense is not a resident of the West Bank.[121] However, where the accused is subject to the parallel jurisdiction of a military court and a civil court, Israeli citizens and residents will be tried before a civil court, unless most of the circumstances relating to the offender and the offense connect the case to the West Bank.[122] An appeal on the Military Court is to the Military Court of Appeal.

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116 The Military Justice Law, at Articles 201–202; In cases where a district court martial tries a case with one judge only (for example, for offenses of being absent without leave), that judge will be a 'jurist judge' (*Id.*, at Article 203).

117 *Id.*, at Article 216; In cases where the Appeals Court Martial hears a case with one judge only (in an appeal on a judgment of a traffic court martial), that judge will be a judge advocate (*Id.*, at Article 215A).

118 Security Provisions Order [Consolidated Version] (Judea and Samaria) (no. 1651), 5710–2009 [hereinafter: Security Provisions Order 2009]; This order replaced most of the earlier orders that regulated the normative framework in the West Bank.

119 The security legislation is all of the legislation enacted by the military commander of the territory.

120 The Military Justice Law, at Articles 8–20.

121 In parallel to the aforesaid Article, which sets out the jurisdiction of the courts martial in the West Bank, it was determined that 'in addition to what is stated in any law, the court in Israel will be competent to try, under the law in force in Israel, a person who is situated in Israel for his act or omission that occurred in the territory'. (Article 2 of the Emergency Regulations (Judea and Samaria – Jurisdiction for Offenses and Legal Assistance), 5767–2007, which extended the Emergency Regulations (Judea and Samaria and Gaza Strip – Jurisdiction for Offenses and Legal Assistance), 5727–1967).

122 See: HCJ 3634/10 *Agbariya v. Attorney–General* (still unpublished, Dec. 9, 2010), at para. 6 of Vice–President Rivlin's judgment.

42. The second relevant security arm that complaints and claims regarding violations of international humanitarian law can be directed against is the Israel Police. There are two categories of police officers: ordinary police that belong to the Israel Police ('blue police'), and police that belong to the Border Police ('green police').[123] The Border Police is a hybrid force that is subordinate to the Israel Police, but recruits soldiers as an alternative to military service. In addition, Border Police participate in operations that are of a similar nature to military operations. Noteworthy for our purposes are the Special Anti–Terror Unit and the Police Undercover Unit. When the Police operate in the West Bank, 'every officer in the Israel Police is regarded as... someone who has been seconded to the commander of the IDF forces in the territories'.[124] As explained below, the distinction between 'blue' and 'green' police is important for the identification of the body that investigates claims directed towards them. Investigating claims against blue police is handled by the Police Internal Investigations Department in the Ministry of Justice (hereinafter: the PIID) whereas investigating claims against green police for shooting incidents committed in the West Bank is handled by the Judea and Samaria District Police.

1. The Police Internal Investigations Department

43. An investigation of claims directed at police is handled by the PIID. The activity of this department, that was established in 1992, is regulated by the Police Ordinance [New Version], 5731–1971 (hereinafter: the Police Ordinance) and also by State Attorney Guideline 14.4 *Authority to investigate and commit for trial when a complaint is made against a*

123 The Border Police is the operational branch of the Israel Police whose purpose is to provide a solution to problems on matters of public security, fighting against terrorism, guarding the Egyptian border and guarding the borderline region between Israel and the West Bank. Furthermore, the Border Police is a multi–purpose force for guarding and policing, whose duties include the prevention of disturbances of the peace, the dispersal of riots and the frustration of, and first response to, terrorist operations. See: www.police.gov.il/mehozot/mishmarHagvol/Pages/default.aspx.

124 The Security Provisions Order, 5710–2009, *supra* note 118, at para. 1.

policeman. The Police Ordinance provides that the investigation of police suspected of offenses whose punishment exceeds one year imprisonment 'shall not be conducted by the Israel Police, but by the Police Internal Investigations Department of the Ministry of Justice'.[125] This provision was legislated *inter alia,* as a result of public criticism that the police investigates its own members, a procedure that undermines the investigation and leads to many incomplete investigations.[126] It should be stated that the investigation of complaints in the disciplinary sphere are still handled by the police but this excludes disciplinary offenses involving the unlawful use of force (which are handled by the PIID).

44. There are several exceptions to the rule according to which investigations of police shall not be conducted by the police themselves.[127] For example, the First Schedule to the Police Ordinance states that offenses carrying a penalty of up to one year imprisonment and also offenses arising from special events determined by the State Attorney and the Police Commissioner will not be investigated by the PIID, but will be investigated by the police. On 25 May 1992, the State Attorney and the Police Commissioner decided that offenses involving the use of firearms by police in the West Bank will be investigated by the police themselves and not by the PIID.[128] These investigations are conducted by the Judea and Samaria District Police, as elaborated below in paragraph 46. It can be

125 The Police Ordinance [New Version], 5731–1971, at Article 49I(a) [hereinafter: the Police Ordinance]. The article was legislated in amendment no. 11 of the Police Ordinance, 5731–1971.

126 The State Comptroller, ANNUAL REPORT 56A FOR 2005, 355 (2005).

127 The exceptions listed in the First Schedule to the Ordinance are:

(1) An offense for which the penalty is no more than one year's imprisonment, unless the State Attorney and the Police Commissioner determined that the offense will be investigated by the department [PIID];

(2) A traffic offense as defined in section 1 of the Traffic Ordinance;

(3) An offense that an authority other than the police is competent to investigate pursuant to law;

(4) An offense committed by a policemen together with another, and the department director, after consultation with the head of the Investigations Division at the police, determined that the role of the policemen in the commission of that offense was secondary;

(5) Offenses deriving from special events as determined by the State Attorney and the Police Commissioner.

128 *Procedure for Investigating Offenses of Policemen* (procedure of the State Attorney's Office and the Police Commissioner, May 25, 1992).

seen from the material brought before the Commission that the rationale behind this exception is the 'unique nature of these incidents, their location, the limitations of the PIID and so on'.[129] A decade later, the police began to take steps to remove the exception, and to return the investigation of the offenses in these incidents to the PIID. This policy decision was based on the sense that the original sentiment behind the creation of the PIID – the realization that the police cannot conduct investigations of its own police officers objectively, independently and fairly – also applies to such incidents.[130]

In 2007, after the issue was examined by the Ministry of Justice, the State Attorney decided to return the investigation of shooting incidents that occur in the West Bank to the PIID.[131] The transfer process, however, has not actually been implemented, and from the material brought before the Commission it can be seen that the PIID has expressed an objection to taking responsibility for the additional investigations. The main reason for the objection is that the PIID is currently undergoing a 'civilianization' process (see below in paragraph 45) which has resulted in the reality that many of the PIID investigators are junior and relatively inexperienced and that adding new tasks to the unit's ordinary tasks will increase the difficulties for the unit's professional staff. Additionally, the PIID claims a lack of resources as well as complications associated with approval for entry of civilian investigators, or investigators who have no combat experience, into military territory (including the complexities of ensuring investigators' security).[132]

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129 *Examination and Investigation Mechanisms in Israel for Complaints and Claims regarding Breaches of the Laws of War*, 8 (Position Paper of the Deputy State Attorney (Special Assignments) submitted to the Turkel Commission, Apr. 6, 2011) [hereinafter: *Deputy State Attorney (Special Assignments), Position Paper*].

130 See: *Investigation of Policemen in Judea and Samaria and the Gaza Strip* (Summary of a Discussion held in the State Attorney's Office, Jul. 4, 2005), the State Attorney emphasized that 'conceptually it is appropriate that an investigation in this area should be conducted by the PIID'.

131 Letter from Eran Shendar, State Attorney, to Inspector-General Moshe Karadi, the Police Chief Commissioner and others, *Investigation of Shooting Incidents by Police in Judea and Samaria* (Feb. 11, 2007) [hereinafter: *State Attorney's Letter regarding the Investigation of Shooting by Policemen 2007*].

132 Meeting between Hoshea Gottlieb, the Commission's Coordinator, and Uri Carmel, Head of the Police

In light of this objection, it was decided to transfer to the PIID investigations involving shooting incidents in the West Bank in two stages. In the first stage, investigations of two types of shooting incidents by police in the West Bank would be immediately transferred: (1) incidents involving 'blue' police, and (2) incidents that take place in areas that 'can usually be reached without any risk',[133] e.g., Givat Ze'ev and Ma'aleh Adumim. The reason for choosing these two types of incidents was that incidents involving 'blue' police raise a more significant concern of a conflict of interest with police investigators and that incidents that take place inside or near the Green Line do not give rise to the problem of civilian investigators entering a military area. In the second stage, which was supposed to be completed by 1 January 2009, investigations of incidents involving 'green' police were supposed to be transferred to the PIID.[134] The second stage of the State Attorney's decision has not, however, been implemented, and therefore claims of breaches that involve shooting incidents in the West Bank are currently investigated by the Judea and Samaria District Police. In recent years, shooting incidents that occurred in the areas around Jerusalem, especially in relation to the construction of the separation barrier, are also regarded as shooting incidents in the West Bank and are investigated by the police.[135] It is important to note that, in 2011, the head of the PIID recommended that shooting incidents involving police in the West Bank should be investigated by the military.[136]

Internal Investigation Department, 1–2 (Sep. 22, 2011) [hereinafter: *Meeting with the Head of the PIID*]; See also: Letter from Herzl Shaviro, Head of the PIID, to Moshe Lador, State Attorney, *The proper identity of the body which should investigate shooting incidents by The Border Police in Judea and Samaria and freezing the decision to transfer to the PIID authority on this matter* (Jan. 30, 2011) [hereinafter: *Letter from the Head of the PIID*].

133 *The Examination and Investigation Mechanisms in Israel for Complaints and Claims Regarding Breaches of the Laws of War – Supplementary Material*, 7 (Position Paper of the Deputy State Attorney (Special Assignments) submitted to the Turkel Commission, Aug. 23, 2011) [hereinafter: *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*].

134 *State Attorney's Letter regarding the Investigation of Shooting by Policemen 2007*, *supra* note 131.

135 *Policy for Investigating Incidents in which a Person is Injured by the Police Forces in the Area Around Jerusalem* (summary of a meeting at the office of the Deputy State Attorney (Criminal Matters), Dec. 8, 2009) [hereinafter: *Summary of Meeting regarding the Investigation of Shooting Incidents in the Area around Jerusalem*].

136 *Letter from the Head of the PIID*, *supra* note 132.

45. The PIID is headed by an attorney whose status is equivalent to that of a district attorney and who is subordinate to the State Attorney and the Attorney–General. Attorneys and investigators work under him. When the PIID was established, most of its investigators were police officers with experience and training in the field of investigations that were 'loaned' to the PIID. However, the Commission was informed by the head of the department that PIID investigators lack training with regard to international law in general and the rules of international humanitarian law in particular.[137] In 2005, it was decided to replace the unit's investigators with civilian investigators that would be recruited from outside the police, in a process that is referred to as a 'civilianization' of the department. The purpose of the change was, *inter alia*, to strengthen the independence and impartiality of the PIID.[138] In a process that began in 2008, the PIID took on civilian investigators, in order to gradually replace the investigators that were 'loaned' from the Israel Police. The new investigators undergo a two month training course from senior police investigators and attorneys from the State Attorney's Office, and following this a year of internship with a senior investigator, during which they work in investigations. From the material that was submitted to the Commission by the PIID it can be seen that the 'civilianization' process is expected to be completed in 2015.[139]

2. The Judea and Samaria Police District

46. Investigations into shooting incidents by the police in the West Bank, are currently conducted by the investigations department of the Judea and Samaria Police District, however, the identity of the individual authorized to decide whether to open an investigation is unclear. As a rule, in operational activity during which there is a death or injury of a civilian due to shooting by the police forces (Border Police) operating in the West Bank under the auspices of the IDF, the decision to open an investigation is

137 *Meeting with the Head of the PIID*, *supra* note 132, at 2–3.

138 *Id.*

139 *Letter from the Head of the PIID*, *supra* note 132, in the annex, at 8–10.

made by the Deputy State Attorney (Criminal Matters),[140] based on a police debrief (hereinafter: the police operational debrief).[141] In practice, however, police operational debriefings do not always occur,[142] and the decision to open an investigation is not in fact always made by the Deputy State Attorney (Criminal Matters), but rather by a police officer in the Judea and Samaria District who is obligated only to *notify* the Deputy State Attorney.[143] It appears that the figure that initially receives the information also influences who makes the decision about opening an investigation. When the information reaches the Deputy State Attorney's Office directly (for example, when human rights organizations file a complaint with the State Attorney's Office, or when the State Attorney's office becomes aware of the incident in some other way), the Deputy State Attorney (Criminal Matters) makes the decision about opening the investigation himself. In contrast, when the information comes directly to the Judea and Samaria District Police (for example, when injured persons complain directly to the police, or when the police become aware of the incident in some other way), the Judea and Samaria District Police make the decision about whether or not to open an investigation.

140 The Police Law, 5766–2006, LA 2045, at Article 102(b)(4)(b) [hereinafter: the Police Law]. See also: Letter from Eran Shendar, State Attorney, to Brigadier–General Anat Shefy, Legal Adviser to the Israel Police, *Applications to Inspect Police Investigation Material pursuant to section 102 of the Police (Disciplinary Rules, Investigating Complaints against Policemen and Miscellaneous Provisions) Law, 5766–2006* (Oct. 4, 2006) [hereinafter: *State Attorney's letter about Police Investigation Material*].

141 Border Police – Operations and Training Department Procedure 60.210.055 *Making an Operational Report* [hereinafter: *the debrief procedure*]; Investigation and Intelligence Department Order 03.300.071 *Investigation of Shooting Incidents in Judea and Samaria in which inhabitants are injured as a result of shooting by Israel Police personnel* [hereinafter: IID Guideline 03.300.071].

142 See, for example: Letter from Yehoshua Lemberger, the Deputy State Attorney (Criminal Matters), to Police Commander Itzik Rahamim, Investigations and Intelligence Department Officer for Judea and Samaria (May 25, 2009).

143 *Summary of Meeting regarding the Investigation of Shooting Incidents in the Area around Jerusalem*, *supra* note 135.

Complaints and Claims Directed at ISA Personnel

47. The third relevant security arm that complaints and claims regarding violations of international humanitarian law can be directed against is the Israel Security Agency. From a historical point of view, the handling of claims against ISA personnel underwent various changes over the years, which mainly concerned the body and the method of handling the claims. During the 1980's, widespread public discussion of these issues occurred following the incident which was later known as the 'Bus 300 Affair' – the killing of terrorists that were captured by ISA personnel, and the ISA's defective handling of the investigation of that affair.[144] During this period, an incident also occurred in which an officer named Izat Nafso was indicted for espionage and convicted on the basis of perjured testimonies.[145] These two incidents led to the establishment in 1987 of a Commission of Inquiry to examine the ISA's investigation methods – the Landau Commission.[146] The Commission exposed an institutional culture of non–cooperation by ISA personnel with external investigators. Following the death of Khaled Sheikh Ali in 1989,[147] a commission of examination (the Sokar Commission) was set up to investigate complaints concerning the conduct of ISA personnel.[148] The State Comptroller Report that reviewed ISA interrogations between 1988–1992 found that even after the Landau Commission Report the phenomenon of lying by investigators to judicial authorities or other investigation or examination authorities had not been eradicated.[149] In February 1992, in response to public criticism, the Minister of Justice decided that the ISA and the State Attorney's Office

144 For details of the affair, see: HCJ 428/86 *Barzilai v. Government of Israel*, 40(3) 505 (1986) [hereinafter: *Barzilai* case].

145 For further details, see: CA 124/87 *Izat Nafso v. Chief Military Prosecutor*, 41(2) 631 (1987).

146 The Commission of Inquiry regarding Interrogation Methods of the Israel Security Agency on matters of Terrorist Activity (Part I), Report (1988).

147 For further details see: CA 532/91 *A v. State of Israel* (unpublished).

148 The Commission for Examining Cases of Death During Interrogation Report (1991).

149 The State Comptroller, Summary of the State Review Report Regarding the Investigation System in the Israel Security Agency (ISA) for the Years 1988–1992, 6 (2000).

would formulate a procedure for referring complaints of persons who were interrogated by the ISA to an external body for investigation.

48. This procedure for examining complaints of interrogated persons was approved by the Ministerial Committee for ISA Matters, and based on that approval a two–stage examination mechanism was established.[150] In the first stage, the complaints of ISA interrogated persons against their interrogators are transferred to the Interrogatee Complaints Comptroller (hereinafter: the Mavtan), who is an ISA employee with a rank equivalent to the rank of Brigadier–General in the IDF or the Israel Police. In order to prevent a conflict of interest between the Mavtan and the ISA interrogators against whom complaints are made, only someone who has not worked in the Investigations Department of the ISA can be appointed Mavtan.[151] In the second stage, the Mavtan transfers his findings to a senior prosecutor from the State Attorney's Office, who is called 'the Mavtan's Supervisor'. It should be noted that both the Mavtan and the Mavtan's Supervisor have been authorized in law as disciplinary investigators, so that they can take testimony from the ISA interrogators against whom complaints are made, for later use in disciplinary proceedings (but not in criminal proceedings).[152]

49. Both the findings of the Mavtan and the recommendations of the Mavtan's Supervisor are transferred to the Attorney–General (or to whomever the Attorney–General delegates his authority) and a decision is made on whether to open a criminal investigation. If it is decided to open a criminal investigation, the file is transferred to the PIID. The discretion to initiate an investigation is limited to the Attorney–General because of 'the unique nature of the ISA's work, the ISA's mission and

150 Decision no. IS/16 of the Ministerial Committee for Israel Security Agency Matters of the 24th Government, *Procedure for Examining Interrogatees' Complaints* (May 20, 1992); The procedure currently applicable was last revised on 1 February 2006.

151 Transcript – Part B, session no. 7 "The Mavtan's testimony" 11 (Apr. 14, 2011) [hereinafter: *Mavtan's Testimony*].

152 The Civil Service (Discipline) Law, 5723–1963, LA 390; and Civil Service (Discipline) (The Israel Security Agency and the Institute for Intelligence and Special Operations) Order, 5739–1979, CR 1750.

the great sensitivity surrounding its work as the authority responsible for frustrating and preventing illegal operations whose purpose is to harm the security of the State, the democratic system of government or its institutions, in view of its fight, *inter alia*, against terrorist organizations'.[153] According to the Police Ordinance, the PIID is authorized to investigate ISA employees where there is a suspicion that a criminal offense has been committed:

> (a) An offense that an employee of the Israel Security Agency is suspected of committing, within the framework of carrying out his duties or with regard to his duties, shall be investigated by the department [PIID], if the Attorney–General so decides; the provisions of section 49B(b)or (c) shall apply in this regard, *mutatis mutandis*; in this subsection, "offense" – any offense except for a traffic offense as defined in section 1 of the Traffic Ordinance, and an offense that another authority, which is not the police or the Israel Security Agency, is competent to investigate according to law.
>
> (b) The Attorney–General may delegate to the State Attorney and to the Deputy State Attorney – in general, for types of cases or for a specific case – his power pursuant to sub–section (a).[154]

50. In 2010, after discussing the Mavtan's activities including an examination of sample cases that he handled,[155] the Attorney–General decided (with the consent of the State Attorney, the head of the ISA and

153 *Deputy State Attorney (Special Assignments), Position Paper*, *supra* note 129, at 10.

154 Police Ordinance in Article 49(I)a. For the considerations underlying the aforesaid amendments, see: explanatory notes to the draft Police Ordinance Amendment Law (no. 12) (Investigation of Israel Security Agency Personnel), 5753–1993, Draft Law 304; Debate on the draft Police Ordinance Amendment Law (no. 12), 5754–1994 (second and third readings), KP 39, 7249 (5754); and also explanatory notes to the draft Police Ordinance Amendment Law (no. 18) (Investigation of Israel Security Agency Employees by the Police Internal Investigations Department), 5764–2003, Government Draft Law 42; Debate on the draft Police Ordinance Amendment Law (no. 18), 5764–2004 (second and third readings), KP 60, 5486 (5764).

155 Letter from Yehoshua Lemberger, Deputy State Attorney (Criminal Matters), to Eran Shendar, State Attorney, *Sample examination of the Mavtan's files* (Oct. 9, 2007).

the Director–General of the Ministry of Justice) that the Mavtan would no longer be an ISA employee but an employee of the Ministry of Justice and that he should be subordinate administratively and organizationally to the Director–General of the Ministry of Justice, and professionally to the Mavtan's Supervisor, the State Attorney and the Attorney–General. This policy decision emanated from a combination of reasons, amongst them, the finding that the Mavtan 'lacks in practice investigative experience which is definitely required for this position', as well as 'a problem of perception, i.e., the inherent difficulty to justify a situation in which... an internal employee in the ISA examines complaints – ostensibly criminal – against his co–workers'.[156] It is important to note that the Commission was informed that, even after the proposed change, the Mavtan will still have access to documents and information in the possession of the ISA, in order to allow the Mavtan to carry out his work in an optimal manner.[157] Until the submission of this Report, this decision of the Attorney–General has not yet been implemented.

Complaints and Claims Directed at Prison Wardens

51. The fourth security arm that complaints and claims regarding violations of international humanitarian law can be directed at is the Israel Prison Service. The National Prison Wardens Investigation Unit (hereinafter: the NPWIU) is responsible for examining and investigating claims that criminal offenses were commited by Israel Prison Service wardens within the framework of carrying out their duties. The NPWIU is subordinate to the National Unit for International Investigations, as a part of the Investigations and Intelligence Division at the Israel Police. The NPWIU is headed by an officer with the rank of Chief Superintendent,

156 *Transfer of the Mavtan to the Ministry of Justice* (Summary of Discussion of Oct. 4, 2010, Attorney–General's office, Nov. 11, 2010).

157 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 8.

and under him work 11 investigators, most of whom are appointed to the job after training as police investigators and serving in the National Unit for International Investigations. When needed, the NPWIU receives cooperation and reinforcement from additional units in the Investigations and Intelligence Division of the Israel Police, such as the National Unit for International Investigations, which reinforces the NPWIU with investigators and with evaluation, intelligence, communications and detection services.[158]

Complaints and Claims Directed at the Civilian Echelon

52. Complaints and claims regarding violations of international humanitarian law can also be directed at the civilian echelon. It is clear that when a suspicion arises that senior members of the executive branch have breached the law, the suspicion must be assessed in the same way as suspicions against any other person. Thus, the Supreme Court held that on the question of investigating violations of international law:

> The rule of law in its formal sense means that all parties in the State, whether private parties such as individuals and corporations or the branches of the State, should act according to the law, and an act contrary to the law should lead to the organized sanction of society. The rule of law, in this sense, has two meanings: the legality of government and the enforcement of law... Therefore, if the Attorney–General is of the opinion that there is *prima facie* evidence that justifies an investigation of very serious offenses that were committed by any person in the executive branch, the rule of law requires an investigation and examination. This is how we would act with regard to any other person. This is how we should act with regard to political leaders. Security considerations do not require any other outcome. There

158 *Id.*, at 9–10.

> is no security without law. The rule of law is an element of national security. Security necessitates the finding of proper tools for an investigation.[159]

53. The police, who investigate suspicions against civilians in general, also investigate claims against senior officials. However, the decision to initiate a criminal investigation against members of government requires the approval of the Attorney–General.[160]

54. Apart from the criminal proceeding of examination and investigation, Israel has a mechanism of commissions of inquiry, which as a rule, addresses claims directed at decision makers in the civilian echelon. These commissions of inquiry may be of different types: a State commission of inquiry; a government commission of examination; a commission of assessment; and a parliamentary committee of inquiry.

1. State Commission of Inquiry

55. One type of commission of inquiry that exists in Israel is a State commission of inquiry. A State commission of inquiry is regulated in the Commissions of Inquiry Law, 5729–1968 (hereinafter: the Commissions of Inquiry Law), and it is established by the government when necessary and at its discretion.[161] According to the Commissions of Inquiry Law:

> (a) in the decision to establish a commission of inquiry the government will define the matter which will be the subject of the inquiry.
>
> (b) the government may, upon the request of the commission extend or restrict the subject matter of the inquiry.[162]

159 *Barzilai* case, *supra* note 144, at para. 45 of Justice Barak's judgment.

160 *Investigation of Public Figures*,Attorney–General Guideline 4.2200 (2006).

161 The Commissions of Inquiry Law, 5729–1968, LA 548, at Article 1.

162 *Id.*, at Article 2.

When the government decides to appoint a State commission of inquiry, it shall give notice to the President of the Supreme Court, 'and he will appoint the head of the commission and the rest of its members'.[163] The Supreme Court considered the government's general authority to appoint a commission of inquiry and held that: 'The choice to appoint or not to appoint a State commission of inquiry lies at the heart of the authority of the executive branch'.[164] In special circumstances that are listed in the State Comptroller Law, 5718–1958, the State Control Committee of the Knesset also has the power to decide to appoint a State commission of inquiry.[165]

Over the years, 14 commissions of inquiry have been established according to the Commissions of Inquiry Law, and four commissions of inquiry were established according to the State Comptroller Law. Several of them have examined claims of violations of international humanitarian law, for example, the Landau Commission (discussed above); and the Kahan Commission which investigated the Israeli involvement in the atrocities that were committed against the civilian population in the Sabra and Shatilla refugee camps in Lebanon by a unit of the Lebanese forces.[166]

2. Government Commission of Examination

56. A second type of commission of inquiry that exists in Israel is a government commission of examination. Section 8A of the Government Law, 5761–2001 (amended in 2003) (hereinafter: the Government Law) provides that:

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163 *Id.*, at Article 4(a).

164 HCJ 6728/06 *Ometz, Citizens for Proper Government and Social Justice v. Prime Minister, Mr. Ehud Olmert* (unpublished, Nov. 30, 2006), at para. 10 of Vice–President Rivlin's judgment [hereinafter: *Ometz* case].

165 The State Comptroller Law, 5718–1958, LA 248, at Article 14B [hereinafter: the State Comptroller Law].

166 For further detail, see: The Commission of Inquiry into the Events at the Refugee Camps in Beirut Report (1983).

> If a Minister appoints a commission to examine a specific subject or an incident under his responsibility (hereinafter: appointing Minister), and the commission is headed by a retired Judge, the Minister of Justice may, at the request of the appointing Minister and with the approval of the government, determine that the commission will have the authorities of a commission of inquiry, according to sections 9–11 and 27(b) of the Commissions of Inquiry Law 1968.[167]

Over the years, government commissions of examination were established on various matters, two of which examined claims of violations of international humanitarian law: the Winograd Commission for Examining the Events of the 2006 Lebanon War and the Turkel Commission for Examining the Maritime Incident of 31 May 2010.[168]

3. Commission of Assessment

57. A third type of commission of inquiry that exists in Israel is a commission of assessment. Apart from the Government commission of examination, the Government and any minister in the government may appoint a commission of assessment, provided that no State commission of inquiry has been appointed to examine that same matter.[169] The main difference between this kind of commission and the ones surveyed above is that a commission of assessment has no authorities provided in legislation.[170] Ministers often establish commissions of assessment.

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167 The Government Law, 5761–2001, LA 1780.

168 For further detail, see: The Commission for Examining the Events of the 2006 Lebanon War (the Winograd Commission) FINAL REPORT Vol. I, 484–486 (2008) [hereinafter: *Winograd Commission Report*] (in Hebrew); See also: THE COMMISSION'S FIRST REPORT, *supra* note 101.

On the matter of the discretion of a government commission of examination see also: *Ometz* case, *supra* note 164, and also: HCJ 258/07 *MK Zahava Galon v. Government Commission of Examination for Examining the Events of the Lebanon War 2006* (unpublished, Feb. 6, 2007).

169 The Commissions of Inquiry Law, at Article 28(a).

170 See: HCJ 6001/97 *Amitai, Citizens for Proper Government and Integrity v. Prime Minister* (unpublished, Oct. 22, 1997), at para. 3: 'Like any administrative body, the government may establish a commission of investigation in order to investigate and examine a matter for which it is responsible or which concerns the performance of its duties (see and cf. in this regard the provisions of section 28(a) of the Commissions of Inquiry Law). Such a commission has no regulated status in statute and it is usually used as a tool to investigate internal matters of the authority that appoints it. As

Two examples of commissions of assessment that dealt with significant incidents are the Zorea Commission to investigate the 300 Bus Affair and the Ciechanover Commission that investigated the failed attempt to assassinate the Hamas leader Khaled Mashal in Jordan.[171]

4. Parliamentary Committee of Inquiry

58. A fourth type of commission of inquiry in Israel is a parliamentary committee of inquiry. Apart from the Government, the Knesset is also authorized to appoint committees of inquiry according to section 22 of the Basic Law: the Knesset, which states that:

> The Knesset may appoint committees of inquiry, whether by authorizing one of the standing committees or by electing a committee from among its members, in order to investigate matters that the Knesset determines; the powers and functions of a committee shall be determined by the Knesset; every committee of inquiry shall also contain representatives of parties that are not members of the government, according to the balance of power of the parties in the Knesset.[172]

Over the years, 25 parliamentary committees of inquiry have been established. For example, in 1951 a parliamentary committee was established regarding detainees of the Jalami Camp which dealt with violations of human rights.[173]

Y. Zamir says of this in his book Administrative Authority, vol. 1, at page 418: "Often a commission of investigation is established to investigate a particular matter without any statutory authority. Such commissions are usually called commissions of investigation. Indeed, commissions without any statutory authority have no enforcement powers, but in many cases there is no need for such powers in order to arrive at the truth. The participation of public representatives or experts on commissions of investigation may add to them a dimension of prestige, professionalism and credibility" '.

171 For further details, see: The Commission for Investigating the Failed Assassination Attempt of the Hamas Leader, Khaled Mashal, in Jordan REPORT (1998).

172 Basic Law: the Knesset, LA 1958 244.

173 For further details, see: The Report of the Parliamentary Committee of Inquiry Regarding the Detainees of the Jalami Camp, KP 28, 2196 (1951), *available at:* www.knesset.gov.il/committees/heb/docs/piqJalamiReport.pdf (in Hebrew).

Oversight and Review of Investigative Bodies

59. The first part of this section ('who investigates?') surveyed the mechanisms for examining and investigating claims of violations of international humanitarian law in Israel, i.e., the MAG Corps, the CID, the courts martial, the PIID, the Israel Police, the Mavtan, the NPWIU and the commissions of inquiry. In this part we will present the institutions that oversee and review the conduct of the examination and investigation mechanisms, i.e., the Attorney–General, who stands at the head of the public legal system and serves as the Chief Prosecutor and the Supreme Court, sitting as the High Court of Justice.

1. Oversight

60. The Attorney–General heads the legal system of the executive branch. His duties include giving advice to the government and the various agencies that operate on its behalf, representing the State and executive agencies in the courts, and protecting the public interest in the field of law. As the authorized interpreter of the law for the executive branch, his guidelines bind all the branches of government and State agencies, including the IDF and the other security forces.[174]

61. In order to carry out his advisory duties, the Attorney–General is assisted by six deputies, who manage the advice and legislation departments at the Ministry of Justice. From the material submitted to the Commission, it appears that there is no department that specializes in advice on international humanitarian law.[175] Apart from the deputies, the

174 See: The Public Commission for Examining the Methods of Appointing the Attorney–General and Matters Relating to his Office Report (1999); See also: HCJ 4267/93 *Amitai, Citizens for Proper Government and Integrity v. Prime Minister*, 47(5) 441, 475 (1993).

175 It should be noted that there are several bodies in the Ministry of Justice and the State Attorney's Office that specialize in international law, including the International Agreements and International Claims Unit in the Ministry of Justice (which includes the Human Rights and Foreign Relations Department), the International Affairs Department at the State Attorney's Office and the Special Assignments (International) Department at the State Attorney's Office. In addition, the Deputy Attorney–General (Special Assignments) handles such matters on a regular basis.

Attorney–General is also assisted, when he considers matters involving the operations of the defense forces (including international law issues), by the High Court of Justice Department at the State Attorney's Office (which represents the army, amongst others, in petitions against it).[176] This department also has no particular specialization in the field of international law.

Oversight of the Military System

62. By virtue of his position as head of the legal service in Israel, the Attorney–General has the authority to give professional guidance to the MAG. The issue of the involvement of the Attorney–General in the MAG's decision was summarized by the Supreme Court in the following guidelines:

> (1) The Attorney–General may intervene and even order the Military Advocate–General how to act with regard to decisions that he thinks are of special importance to the public or where he finds that the implications go beyond the military sphere. The Attorney–General may intervene in these matters within the framework of his position as the person who has supreme responsibility for the various prosecution authorities and legal agencies in the executive branch.
>
> (2) The Attorney–General will intervene in the decisions of the Military Advocate–General in all of those cases where the decision of the Military Advocate–General departs from accepted legal norms. The Attorney–General may intervene in these decisions by virtue of his power as the person responsible for the legality of the actions of the various branches of government.

176 The High Court of Justice Department constitutes a part of the State Attorney's main office in Jerusalem, and it numbers approximately 40 employees; The advocates in the Department represent the government and the other State agencies in administrative and constitutional proceedings taking place in the Supreme Court. For further detail, see: Uzi Fogelman, *The High Court of Justice Department in the State Attorney's Office*, 6 MISHPAT UMIMSHAL (LAW AND GOVERNMENT) 173 (2001); Osnat Mandel, *On Lawyering in the High Court of Justice's Petitions Department*, 2 MA'ASEI MISHPAT (LEGAL PRACTICE) 53 (2009).

(3) In matters concerning general policy, such as the military prosecution policy regarding committal for trial, the Military Advocate–General is obliged to take into account the Public Prosecution policy determined by the Attorney–General and the need for uniformity and harmony between the various prosecution agencies. The Attorney–General may intervene in the decisions of the Military Advocate–General when the latter has not given proper weight to this consideration.[177]

These guidelines of the Supreme Court are demonstrated in the authority of the Attorney–General to instruct to the MAG in cases where he is of the opinion that there is a basis for his intervention or instructions; in cases where the MAG asks of his own initiative to consult with the Attorney–General; or following a request by an external body on the subject of the policy or conduct of the MAG, in which case the Attorney–General will need to formulate his position on the issue, and he can adopt the position of the MAG or instruct him to change his policy.[178] The Attorney–General's involvement with the decisions of the MAG is routinely demonstrated when discussions are held between the High Court of Justice Department at the State Attorney's Office and the MAG Corps about petitions against the military that are filed in the Supreme Court. In cases where a disagreement arises between the MAG and the State Attorney's Office about the position of the State to be submitted to the Court, the matter is referred to the Attorney–General, whose decision binds both the MAG and the State Attorney's Office.[179]

2. Review

A. The Attorney–General (in his Role as Chief Prosecutor)

63. One of the bodies that the Attorney–General reviews is the MAG

177 HCJ 4723/96 *Atiya v. Attorney–General*, 51(3) 714, 733 (1997) [hereinafter: *Atiya* case].

178 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133.

179 *Deputy State Attorney (Special Assignments), Position Paper*, *supra* note 129, at 3.

Corps. More specifically, he acts in his capacity as reviewer of the MAG in particular cases. It was determined by the Supreme Court in *Atiya v. Attorney–General* that decisions of the MAG which, in the Attorney–General's opinion are of special public interest, or decisions with implications that extend beyond the military sphere are to be assessed by the Attorney–General or someone acting on his behalf. If there is a basis for intervention, the Attorney–General will intervene in the decisions of the MAG.[180] In the material that was submitted to the Commission, it was stated that, as a rule, decisions concerning claims of violations of international humanitarian law are a class of decisions that is of special public interest, and therefore any question on these issues will be examined by the Attorney–General or by whomsoever he appoints for this purpose on its merits, and a decision will be made after verifying all the circumstances of the case.[181] It should be noted that in cases of fatal training accidents in the IDF, the Attorney–General Guidelines contain a unique procedure for objecting to the Attorney–General against decisions of the MAG to close an investigation file.[182]

64. The Attorney–General's authority to review the decisions of investigation bodies in the other security forces (i.e., the Israel Police, the PIID and the bodies that investigate the ISA) is regulated in law by an appeal mechanism.[183]

B. The Supreme Court

65. The Supreme Court, sitting as the High Court of Justice (hereinafter: HCJ), hears petitions that are submitted to the Court concerning the actions of the government and its agencies, including the decisions of the Attorney–

180 *Atiya* case, *supra* note 177.

181 *Deputy State Attorney (Special Assignments), Position Paper*, *supra* note 129, at 4.

182 *Fatal Accidents in the IDF – Appeal to the Attorney–General against a Decision of the Military Advocate–General to Close an Investigation File*, ATTORNEY–GENERAL GUIDELINE 4.5000 (2002).

183 Criminal Procedure Law, at Article 64.

General and the military justice system. In this framework, the Court exercises judicial review over issues to which international humanitarian law applies, even while hostilities are ongoing. Over the years, the HCJ has reviewed various issues, amongst them: the interrogation techniques employed by the ISA;[184] the route of specific sections of the separation barrier;[185] government decisions relating to the humanitarian situation in the Gaza Strip, for example, the decision to restrict the supply of fuel and electricity;[186] and widespread review of IDF operational activity such as, early warning procedures;[187] the targeted killing policy;[188] assigned residency;[189] evacuating bodies during 'Operation Defensive Shield';[190] the siege on the Church of the Nativity;[191] and claims concerning the humanitarian situation in the Gaza Strip during Operation 'Cast Lead'.[192]

For our purposes, it is important to emphasize that the HCJ has also reviewed the investigation policy of the IDF, for example, the MAG's policy not to open an investigation following the death of civilians as a result of IDF military activity in the West Bank (the *B'Tselem* case discussed below),[193] and the investigation policy of complaints directed at ISA interrogators.[194] Furthermore, the HCJ also intervened in concrete decisions of the MAG relating to the investigation process. The HCJ considered a petition against

184 HCJ 5100/94 *Public Committee Against Torture in Israel v. The State of Israel*, 53(4) 817 (1999); HCJ 11447/04 *Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. The Attorney–General* (unpublished, Jun. 14, 2005), in paras. 6 and 9 of President Barak's judgment [hereinafter: *2004 Center for the Defence* case].

185 HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel*, 58(5) 807 (2004); HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel*, 60(2) 477 (2005).

186 HCJ 9132/07 *AlBassiouni v. Prime Minister* (unpublished, Jan. 30, 2008).

187 HCJ 3799/02 *Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, 60(3) 67 (2005).

188 HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel*, 62(1) 507 (2006) [hereinafter: *Targeted Killing* case].

189 HCJ 7015/02 *Ajuri v. IDF Commander in West Bank*, 56(6) 352 (2002) [hereinafter: *Ajuri* case].

190 HCJ 3114/02 *MK Barake v. The Minister of Defense, Benjamin Ben–Eliezer*, 56(3) 11 (2002).

191 *Almandi* case, *supra* note 4.

192 HCJ 201/09 *Physicians for Human Rights v. Prime Minister of Israel* (still unpublished, Jan. 19, 2009).

193 See: *B'Tselem* case, *supra* note 6.

194 HCJ 1265/11 *Public Committee Against Torture in Israel v. Attorney–General* (still unpublished, Aug. 6, 2012) [hereinafter: *2011 Public Committee Against Torture* case].

the decision of the MAG not to open an investigation following incidents involving the injury to civilians and destruction of houses,[195] and recently it reviewed the decision of the MAG not to open an investigation following the death of a Palestinian in the course of a military operation.[196] The HCJ also exercises judicial review over concrete decisions whether or not to open investigations into complaints directed at police and ISA interrogators.[197] It should be noted, however, that the HCJ's intervention in concrete cases is limited to decisions that have been tainted by extreme unreasonableness or a material injustice.[198]

195 *2011 Adalah* case, *supra* note 28; See, also: *Abu Rahme* case, *supra* note 18, where the Court discussed whether the indictments selected by the MAG conform to relevant rules of international law; HCJ 425/89 *Tzofan v. Military Advocate–General*, 43(4) 718 (1989), where the Court considered the MAG's decision to indict for disciplinary proceedings rather than a criminal trial.

196 HCJ 1901/08 *D'babse v. The Military Advocate–General* (still unpublished, Jul. 15, 2012).

197 For a review of decisions to refrain from prosecuting ISA interrogators see: HCJ 2150/96 *Harizat v. The Attorney–General* (unpublished, Mar. 26, 2002), in para. 8 of Justice Strasberg–Cohen's verdict [hereinafter: *Harizat* case]; *2004 Center for the Defence* case, *supra* note 184, in paras. 6 and 9 of President Barak's judgment; HCJ 6138/10 *Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. The Attorney–General* (still unpublished, Jan. 12, 2011), at para. 4 of Justice Fogelman's judgment. For decisions concerning legal measures against police, see: HCJ 5817/08 *Aramin v. Attorney–General* (still unpublished, Jul. 10, 2011) [hereinafter: *Aramin* case]; See also: HCJ 1299/05 *Anonymous v. Attorney–General* (unpublished, Jan. 23, 2007), in para 13 of Justice Procaccia's judgment.

198 See: *Harizat* case, *supra* note 197, at para. 6 of Justice Strasberg–Cohen's judgment; HCJ 6009/94 *Shafran v. Chief Military Prosecutor, Colonel Dan Beeri*, 48(5) 573, 582 (1994); HCJ 4550/94 *Isha v. Attorney–General*, 49(5) 859, 871 (1995).

D. The Grounds that Give Rise to an Obligation to Investigate in Israel ('When to Investigate?')

66. In this section of the chapter, we will discuss the processes that lead to opening an examination or investigation in Israel by the various investigation authorities. This depends upon two interrelated questions. First, what are the grounds that give rise to the obligation to investigate violations of international humanitarian law according to the law and practice in Israel. Second, what are the reporting duties for suspicions of violations, including the duties to document the scene of an incident. These procedures are essential because they form the basis for establishing grounds for an examination and investigation. These questions will be examined with relation to the IDF, the police, the PIID and the NPWIU, and the ISA.

The Grounds that Give Rise to an Obligation to Investigate in the IDF

1. Investigation Policy

67. The grounds that give rise to an obligation to investigate complaints and claims of violations of international humanitarian law in the IDF are set out in General Staff Order 33.0304 (hereinafter: the Order), and in the various guidelines of the MAG. According to the Order a criminal investigation must be started by the CID in cases where there is a basis for a suspicion that offenses stipulated in the Order have been committed,[199] including: looting,[200] rape[201] and unlawful use of weapons (i.e., without authority or without taking proper precautions) in cases of wounding,

199 General Staff Order 33.0304, *supra* note 89, at para. 62.

200 *Id.*, at para. 62A(19).

201 *Id.*, at para. 62A(20).

threats or deliberately endangering someone.[202] The Order further provides that when there is a basis for a suspicion that an offense the Penal Law has been committed and there is no corresponding offense in the Military Justice Law, an investigation shall be opened by the CID, provided that the offense is connected with the suspect's military service.[203] Notwithstanding, the Order provides that a commander of a CID has discretion *not* to open an investigation in these cases, after consulting with a military advocate when 'in his opinion there is no objective justification for doing so'.[204]

68. According to the MAG, this discretion provided in the Order is the only legal basis in Israeli law for his guidelines that determine the circumstances in which a CID investigation is opened immediately.[205] These guidelines are referred to as 'the investigation policy'.

Until 2000, the investigation policy determined that 'almost every case of death, and also certain cases of injury to Palestinian residents [in the West Bank and the Gaza Strip], that occurred in the framework [of the] friction... between IDF forces and the population led to an immediate opening of a CID investigation'.[206] In 2000, the MAG changed the investigation policy so that, in an incident where a Palestinian resident was killed as a result of military operations, the decision whether to open an investigation would be delayed until an operational debriefing of the incident would be received by the MAG (for a detailed explanation of the operational debrief see below in paragraphs 88–93). The MAG instructed the opening of an investigation if the circumstances revealed in the debriefing (and other available data) raised a suspicion of the commission of an offense.[207]

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202 *Id.*, at para. 62A(26).

203 *Id.*, at para. 62C.

204 *Id.*, at para. 63.

205 *The Public Commission for Examining the Maritime Incident of May 31, 2010 – Supplementary Material* 14 (position paper of the MAG Corps submitted to the Turkel Commission, Aug. 9, 2011) [hereinafter: *MAG Position Paper 2011 – Supplementary Material*].

206 *MAG Position Paper 2010*, *supra* note 55, at 9.

207 *MAG Position Paper 2011 – Supplementary Material*, *supra* note 205, at 14.

According to the MAG, the change in 2000 to the investigation policy was a result of an escalation in the conflict between Israel and the Palestinians. In that year the Second Intifada erupted where suicide attacks were renewed in Israel and violent incidents occurred in the West Bank and the Gaza Strip. In these territories the IDF forces contended with armed Palestinians equipped with a wide variety of standard and improvised weapons. This situation led to a shift in the nature of the IDF's operations, which was demonstrated by the amount of force, weapons and methods of warfare, and in a change in the rules of engagement, which permitted the use of deadly force against persons identified as involved in combat or in terrorist operations.[208] Consequently, Israel announced that a change had occurred in its position on the legal framework regulating IDF operations in the West Bank and the Gaza Strip because the level of hostilities amounted to an armed conflict. The Supreme Court came to a similar legal determination and held that Israel is involved in an armed conflict with Palestinian terrorist organizations.[209] Thus, during this period, the applicable law governing the activity of the IDF in the West Bank and Gaza Strip was international humanitarian law and in particular the rules regulating the conduct of hostilities according to which the death of a civilian does not of itself give rise to a suspicion that an offense has been committed and, therefore, does not necessarily require the opening of an investigation.

69. In 2011, shortly before the MAG and the Attorney–General testified before this Commission, the MAG decided, with the Attorney–General's approval, to change the investigation policy yet again. According to the MAG, this new policy derives from 'a significant change in the nature of the operational activity of the IDF forces in the West Bank that, generally, no longer bears a clear combat character'.[210] According to the new policy,

208 *MAG Position Paper 2010*, *supra* note 55, at 12.

209 *Targeted Killing* case, *supra* note 188, at para. 40 of President Barak's judgment; *Ajuri* case, *supra* note 189, at para 13 of President Barak's judgment.

210 Letter of Major–General Avichai Mandelblit, the MAG, to Yehuda Weinstein, Attorney–General,

the CID is obligated to open an immediate investigation in every case of the death of a Palestinian resident as a result of operations by the IDF forces in the West Bank, except in 'cases where it is clear that the operations during which the Palestinian inhabitant was killed were of a real combat nature'.[211] In case of death in course of combat, the decision of whether to open an investigation must be made only after conducting an initial assessment of the facts of the case through an operational debrief (similar to the policy set in 2000).[212]

70. Thus, until 2000, the death of a Palestinian civilian as a result of IDF activity in the West Bank and Gaza triggered the immediate opening of an investigation; between 2000–2011, the decision on whether to open an investigation into the death of a Palestinian civilian was delayed until receiving the findings of an operational debrief; since 2011, the death of a resident in the West Bank triggers the opening of an immediate CID investigation, except for incidents that occurred during actual combat activity where the decision of whether to open an investigation is delayed until receiving operational debrief findings, based on which the MAG decides if a suspicion to an offense arises and, therefore, whether an investigation shall be opened.

71. The current investigation policy (the policy from 2011) was approved by the Supreme Court in the *B'Tselem* case, which held that:

> ... the obligation is not to investigate every case of death, but *to investigate every case of death where there is a concern that it is the result of prohibited conduct*, i.e., where there is a concern of a breach of the law and a criminal offense. This obligation applies both in times of war and in times of calm; when there is a suspicion of prohibited conduct, an investigation should

Investigations Policy of IDF operations in the West Bank, 8 (Apr. 4, 2011).

211 *Id.*

212 *Id.*

be started in order to investigate that suspicion. However, the balancing point and the scope of the expression "suspicion of prohibited conduct" varies according to the circumstances of the particular incident, and the grounds that justify opening an investigation always depend on the circumstances. It can be seen from the respondent's updating notice that in incidents taking place in the territory of Judea and Samaria that are not of a "actual combat nature," the respondent is of the opinion that *the death of a Palestinian civilian in itself gives rise to a suspicion of unlawful conduct*, according to the laws that apply to the territory and such operations, and therefore it justifies the opening of an investigation by the CID. The respondent's new policy, as set out in the revised statement, is acceptable to us, since it reflects the viewpoint that as the role of the security forces in the territories changes, there is also a change in the balancing point and in the manner of implementing the law.[213]

2. Reporting Procedures

72. The general duty to report offenses in the IDF is enshrined in the Military Justice Law, which provides that 'a commander who knows or has reasonable grounds to believe that one of his subordinates has committed an offense' should prepare a complaint and bring it before a competent officer (hereinafter: the general reporting duty).[214] With regards to reporting duties, a distinction should be made between two types of incidents. The first type concerns incidents that do not result in the death or injury of civilians but which raise a suspicion of other violations of international humanitarian law (for example looting). In such incidents commanders have the general reporting duty to submit the information about the incident to the competent officer. According to General Staff Orders, the competent officer should convey the information in these cases to the CID,

213 *B'Tselem* case, *supra* note 6, at para. 10–11 of President Beinisch's judgment.

214 The Military Justice Law, at Article 225.

without carrying out an examination himself (for further details, see 'How to investigate?').[215]

73. The other type concerns incidents that result in death or injury and to which a different reporting duty applies. The background for this is as follows: In 2005, in response to a petition concerning the MAG's investigation policy discussed above (*B'Tselem* case), the Government stated that it would formulate a procedure that would improve the handling of claims concerning the death of Palestinians in the West Bank that resulted from IDF operations.[216] Following this statement a 'Reporting Procedure for Incidents in which Palestinian Civilians were Injured' was drafted, adopted by the Chief of Staff and enshrined in the orders of the Operations Division in the Operations Department and of the Central Commander's Office (hereinafter: the reporting procedure).[217] According to the reporting procedure, 'in any case in which the aforementioned uninvolved person is killed or injured, the incident will be reported... immediately to the Chief of Staff's chambers, the Operations Branch and the MAG. *The said report will be submitted no later than 48 hours from the time of the incident*'.[218] The Reporting Procedure sets out guidelines for how to fill out a 'Preliminary Report of an Incident involving the Death or Injury of a Palestinian Civilian' form (hereinafter: Preliminary Report Form). The commanders enumerated in the Procedure are responsible for submitting the Preliminary Report Form to the MAG within 48 hours. The Preliminary Report Form must indicate the location of the incident, the time of the incident, details of the soldiers involved, number of casualties including their condition, their gender and age as well as other circumstances.[219] According to the Reporting Procedure, 'copies of the relevant Operation Log

215 General Staff Order 33.0304, *supra* note 89, at para. 62.

216 An interim decision of 14 July 2005 in *B'Tselem* case, *supra* note 6.

217 Orders of the IDF's Operations Branch MB–SP–015 *Reporting Procedure for Incidents in which Palestinian Civilians were Injured* (and Orders of the Central Commander's Office LS–41877, dated Feb. 13, 2007) [hereinafter: Orders of the IDF's Operations Branch and the Central Commander's Office, *Reporting Procedure*].

218 *Id.*

219 *Id.*, in the attached reporting form.

Books, the daily reports and any other relevant material must be attached to the Preliminary Report Form'.[220] The reporting duty further requires that 'it is the responsibility of the regional brigade commander and the unit commander... to ensure the photographing and documentation of the scene immediately after the incident occurred as long as it does not endanger the forces and it is possible in the circumstances',[221] and 'insofar as there are grounds that prevent documenting and photographing... the reasons must be detailed'.[222]

However, in practice, the MAG does not receive a report of incidents involving the death or injury of civilians in accordance with the Reporting Procedure, and in cases where the report is received from military authorities it is transmitted by telephone by the relevant commander, usually in close proximity to the incident.[223] According to the MAG:

> In most of the cases information of an incident reaches the military prosecution in a timeframe of up to 48 hours from the occurrence of the incident. Sometimes, the report may come from external sources such as the media or human rights organizations even before it is received from military authorities. As to the reporting from military authorities there are cases in which the information is not submitted in time either because of lack of awareness or failure to observe the procedure, or because in certain cases military authorities are unaware that an operation caused the injury of an individual.[224]

220 *Id.*

221 *Id.*

222 *Id.*

223 Meeting between Hoshea Gottlieb, the Commission's Coordinator, and Major–General Avichai Mandelblit, The MAG 2 (Aug. 10, 2011) [hereinafter: *Meeting with MAG*]. The Commission also asked to receive forms that were completed by the units and prepared in accordance with the Reporting Procedure, but it was told that no such forms exist.

224 *MAG Position Paper 2011 – Supplementary Material*, *supra* note 205, at 6.

The Grounds that Give Rise to an Obligation to Investigate in the Police

1. Investigation Policy

74. The grounds that give rise to an obligation to investigate in the police complaints and claims of offenses are set out in Article 59 to the Criminal Procedure Law, according to which, 'If the police become aware of the commission of an offense, whether as a result of a complaint or in any other way, they shall begin an investigation'.[225] However, as stated above in paragraph 46, in operational activity during which there is a death or injury of a civilian due to shooting by Border Police operating in the West Bank under the auspices of the IDF, the decision is delayed until the Deputy State Attorney (Criminal Matters) receives a police operational debrief according to which, *inter alia*, he makes a decision whether to open an investigation. The grounds for which the Deputy State Attorney will instruct that an investigation should be opened into shooting incidents involving Border Police are the same as the grounds for which the MAG will instruct that an investigation should be opened into incidents involving the IDF.[226] In practice, however, it appears that because it is not always clear who decides to open an investigation (see above in paragraph 46), the grounds upon which the investigation is opened are also unclear because they are dependent on the identity of the deciding figure. When the police (a Judea and Samaria District officer) is the body that decides whether to open an investigation it acts according to the grounds set in Article 59 even in shooting incidents in the West Bank.

225 The Criminal Procedure Law, at Article 59. It should be noted that the law authorizes a police officer to decide not to investigate offenses which are not a felony. As for the duty to investigate, see also HCJFH 7516/03 *Nimrodi v. Attorney–General* (unpublished, Feb. 12, 2004).

226 In 2011, in the context of the Government's statement in the Supreme Court *B'Tselem* case, *supra* note 6, the Government stated that it decided to 'make a similar change to the investigation policy relating to police units operating in Judea and Samaria in military operations under the command of the IDF'. See: Letter from Yehoshua Lemberger, the Deputy State Attorney (Criminal Matters), to Police Commander Shaul Gordon, Legal Adviser to the Israel Police (Jun. 9, 2011).

2. Reporting Procedures

75. Reporting procedures also apply to incidents in the West Bank where Palestinian civilians are injured as a result of shooting by members of the police force. According to a procedure of the Investigations and Intelligence Department of the Israel Police the commander of a company or unit should report every case in which a 'local inhabitant' is injured as a result of shooting by police in the course of operations in the West Bank.[227] The report is sent to three individuals: the commander of the police station for the area in which the incident occurred; the commander of the local division or the area commander; and the director of the PIID in the Ministry of Justice (even though according to the current procedures the PIID is not involved in investigating these incidents). Moreover, the commander of the divisional administration should report immediately to the IDF commander in the area, to the Border Police Commander in cases where Border Police forces were involved in the incident, to the commander of the Judea and Samaria District and to the head of the Investigations and Intelligence Department in the Police. According to the police procedure the report should contain details of the incident, including the location of the incident, the time that it occurred, the circumstances, the number of civilians injured and the type of injuries, details of the police officers who carried out the shooting and details of the force commander.

76. Nonetheless, similar to the situation regarding the Reporting Procedure in the IDF, from the material presented to the Commission, it can be seen that the police Reporting Procedure is not carried out as specified, and sometimes a considerable amount of time passes before the information about injuries to civilians is conveyed to the investigating authorities.[228] Moreover, sometimes the investigating authorities become

227 IID GUIDELINE 03.300.071, *supra* note 141.

228 Meeting between Hoshea Gottlieb, the Commission's Coordinator, and Yehoshua Lemberger, Deputy State Attorney (Criminal Matters), and the Deputy Legal Adviser of the Israel Police, the Legal Adviser of the Border Police and the Deputy Head of the Investigations Division in the Judea and Samaria District of the Israel Police, 5–6 (Oct. 5, 2011) [hereinafter: *Meeting with the Deputy State*

aware of the injury only indirectly, for example as a result of the filing of a tort action made by victims of the incident.[229]

It should be noted in this context that the Commission is unaware of the existence of a procedure for non–shooting incidents in which police officers are involved, but give rise to a suspicion of other violations of international humanitarian law (for example looting).

THE GROUNDS THAT GIVE RISE TO AN OBLIGATION TO INVESTIGATE IN THE PIID AND THE NPWIU

1. Investigation Policy

77. The grounds that give rise to an obligation for the PIID and the NPWIU to investigate complaints and claims of offenses are set out in Article 59 of the Criminal Procedure Law.[230] The Deputy State Attorney (Special Assignments) emphasized that 'although Section 59 of the Criminal Procedure Law grants the police officer the discretion not to open an investigation for reasons of public interest, according to police procedures for prison wardens, if there is a *prima facie* suspicion that a criminal offense has been committed related to the warden's position generally an investigation will be opened'.[231] Therefore, the threshold for opening investigations against prison wardens can differ from the threshold for opening an investigation against police officers (detailed above). In addition, the procedure of the Investigations and Intelligence

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Attorney (Criminal Matters)]; See also, for example: *Aramin* case, *supra* note 197; *Exceptions – Committing IDF Soldiers for Trial in and after the Second Intifada, 2000–2007* 15–16 YESH DIN (Sep. 2008), *available at:* www. yesh–din.org/sys/images/File/Exceptions%5BEng%5D%5B1%5D.pdf.

229 *Meeting with the Deputy State Attorney (Criminal Matters)*, *supra* note 228, at 3.

230 See *supra*, at para. 43; See also: The Police Ordinance, at Article 49I(a), which states that despite all other laws, the investigation of an offense in which a police officer is a suspect will be investigated by the PIID (except for an offense whose punishment exceeds one year imprisonment, unless the State Attorney and the General Comptroller decide it will be investigated by the PIID).

231 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 9–11.

Department of the Israel Police, which regulates the handling of offenses committed bywardens, provides that 'if the complaint raises a suspicion of only a disciplinary offense before an investigation was opened the file will be closed by the head of the NPWIU with the approval of the State Attorney's Office'.[232]

78. It should be noted that there is a special procedure concerning investigations regarding the death of detainees or prisoners that can be held outside the police:

> If a person dies and there is a reasonable ground for suspicion that the cause of his death is not natural or that his death was caused by an offense, *and if a person dies when he is in detention or imprisonment* or when he is hospitalized in a mental hospital or in a closed institution for retarded children, the Attorney–General or his representative, a police officer, a physician or any interested person may apply to a judge of the Magistrates Court in whose jurisdiction the death occurred or the body was found (hereinafter – investigating judge) to investigate the cause of death.
>
> In this section, "interested person" – includes the spouse of the deceased, his parents, grandparents, descendants, brothers or sisters'.[233]

2. Reporting Procedures

A. The Police Internal Investigation Department (PIID)

79. In general, the information about suspicions of offenses reaches the PIID by means of complaints (whether from the complainant himself or

232 IID GUIDELINE 03.300.071, *supra* note 141, at para. 2a(5).

233 The Investigation of Causes of Death Law, 5718–1958, LA 242, at Article 19 [emphasis added]; STANDING ORDERS OF THE ISRAEL POLICE 14.01.013 *Investigation of incidents of death*, at Articles 1 and 4A, adopt what is stated in the law with regard to the grounds for opening an investigation for the purposes of the standing orders of the police.

from somebody acting on his behalf).[234] A complaint may be filed with the PIID in writing or by appearing in person at one of the PIID's offices and filing a complaint with an investigator.[235] A detainee or prisoner who wishes to file a complaint against a police officer should send his complaint to the manager of the custodial facility in which he is held, and the manager will refer the complaint to the PIID. In such cases, according to the procedures, a representative of the PIID will come to the detention facility or the prison and continue the handling of the complaint.[236]

80. Inhabitants of the West Bank, who are unable to enter Israel in order to file a complaint, may file a written complaint, and in certain cases, a meeting with a PIID investigator is arranged at one of the border crossings in order to obtain details of the complaint.[237] However, there is a lack of clarity about the correct 'address' for filing the complaint (complaints against police concerning shooting incidents should be filed with the police, whereas complaints against police concerning all other offenses, including the use of force during disturbances of public order, should be filed with the PIID). Additionally, it has been claimed that in practice it is difficult to arrange meetings at border crossings and to obtain an interpreter, and that in many cases the complaints are investigated only after a considerable time delay.[238]

81. Information concerning offenses committed by police officers can also reach the PIID other than by way of complaints. Thus, for example,

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234 *Deputy State Attorney (Special Assignments), Position Paper*, *supra* note 129, at 7.

235 The PIID's offices are located in Nazareth, Tiberias, Haifa, Tel–Aviv, Rehovot, Ashkelon, Eilat and Beer–Sheba.

236 *Deputy State Attorney (Special Assignments), Position Paper*, *supra* note 129, at 7.

237 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 5; See, for example: PIID file 2471/10, PIID file 768/11, PIID file 782/11 and PIID file 2433/11, in which the complainants' testimony was taken by a PIID investigator at the Rachel border crossings, at the and Hizma checkpoint, at the Qalqilya District Coordination Liaison Office, and at the tunnels border crossing, respectively.

238 *Alleged Investigation – The Failure of the Investigation into Offenses Comitted by IDF Soldiers against Palestinians*, 35–46 Yesh Din (Aug. 2011), *available at:* http://yesh–din.org/userfiles/file/Reports–Hebrew/Alleged%20Investigation%20%5BHebrew%5D.pdf [hereinafter: *Alleged Investigation Report*].

according to Police Orders, a police officer that receives information about a criminal offense committed by another police officer is obliged to refer it to the PIID.[239] This information is received by the police through complaints against police officers that are erroneously filed with the police rather than the PIID and from complaints that interrogatees raise against police officers during their investigation or during court proceedings in their matter.[240]

B. The National Prison Wardens Investigation Unit (NPWIU)

82. Complaints concerning the commission of offenses by employees of the Israel Prison Service may be filed with the NPWIU orally, in writing, or in a report by the Israel Prison Service.[241] According to the Prison Commissioner's Office Order, 'if a prisoner wishes to file a complaint against a warden in connection with his role the prisoner will be given the opportunity to file it in a closed envelope that will be sent directly that day to the NPWIU'.[242] Moreover, the various units of the Israel Prison Service are instructed to report to the head of the disciplinary branch every complaint or information that gives rise to a suspicion of a criminal offense commited by a warden and he will transfer the complaint or the information to the NPWIU.[243] The report should contain insofar as possible 'full details of the individuals involved' and medical documents.[244] When a suspicion of an unlawful use of force against a prisoner arises, even if no complaint is filed, the unit shall report to the head of the Disciplinary

239 NATIONAL POLICE ORDER 06.03.03 *Investigation of Police by the Police and the Police Investigation Department in the Ministry of Justice*, at Article 5A(1).

240 *Deputy State Attorney (Special Assignments) – Position Paper*, *supra* note 129, at 7.

241 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 10.

242 PRISON COMMISSIONER'S OFFICE ORDER 02.10.00 *Handling of Criminal Offenses by Prison Wardens*, at para. 3(d) [hereinafter: PRISON COMMISSIONER'S OFFICE ORDER 02.10.00]; GUIDELINE OF THE INVESTIGATIONS AND INTELLIGENCE DEPARTMENT 03.300.039 *Handling of Prison Wardens' Offenses*, at para. 2(a)(2) [hereinafter: IID GUIDELINE 03.300.039].

243 PRISON COMMISSIONER'S OFFICE ORDER 02.10.00, *supra* note 242, at paras. 3(a), 3(j).

244 *Id.*, at paras. 3(b), 3(J)(2).

Department.[245] The head of this Department is responsible for examining the case, and if he is of the opinion that the use of force was unlawful, he shall refer the handling of the incident to the NPWIU.

83. Information about offenses can also reach the NPWIU by means of the 'official prison visitor' mechanism (hereinafter: an official visitor).[246] An official visitor, is appointed by the Minister of Public Security, from a list of candidates submitted to him each year by the Attorney–General, which includes Ministry of Justice employees, representatives of the Israel Bar Association, employees of public bodies that apply to have their representatives authorized as an official visitor, and any other person that the Minister sees fit to appoint as an official visitor.[247] Additionally, the justices of the Supreme Court, the judges of the District and Magistrates Courts (in the area of their jurisdiction) and also the Attorney–General are 'official visitors' by virtue of their office.[248] An official visitor 'may at any time enter a prison that he has been authorized to visit and examine the conditions there, the manner in which the prisoners are treated, the proper running of the prison and whether all of the aforesaid conforms to the provisions of the law and other rules'.[249] According to an Attorney–General guideline, an official visitor is competent to enter any place in the prison facility, speak with any detainee or prisoner privately and receive any document or information.[250] The guideline further provides that when a prisoner 'raises claims against a warden or a police officer and the official visitor intends to mention this in a report, he should first speak with the warden or police officer against whom the complaint was made. However, if the complaint concerns violence

245 *Id.*, at para. J(1).

246 The Prisons Ordinance, at Article 71.

247 Prison Commissioner's Office Order 03.04.00 *Official Comptrollers in the Prisons*; See also: *Visits to Prison Facilities*, Attorney–General Guideline 4.1201 (2010) [hereinafter: Attorney–General Guideline 4.1201].

248 The Prisons Ordinance, at Article 72.

249 *Id.*, at Article 72A(a); The Commission received reports that were produces as a result of visits to prison facilities by official comptrollers, in accordance with this mechanism, both to ISA facilities and other prison facilities.

250 Attorney–General Guideline 4.1201, *supra* note 247, at paras. 3–10; The Prisons Ordinance, at Article 72A.

or a suspicion of another criminal offense, the persons against whom the complaint was made should not be asked for a response'.[251]

THE GROUNDS THAT GIVE RISE TO AN OBLIGATION TO INVESTIGATE ISA INTERROGATORS

1. Investigation Policy

84. The grounds that give rise to the duty to investigate claims and complaints directed at ISA interrogators are subject to the discretion of the Attorney–General, who examines each case in accordance with Israeli criminal procedure and the Penal Law. As stated above in paragraph 49, the Attorney–General makes the decision to open a criminal investigation against ISA investigators only after an investigation conducted by the Mavtan, and on the basis of the recommendation of the Mavtan's Supervisor.[252]

2. Reporting Procedures

85. The Mavtan receives information regarding violations of international humanitarian law through complaints that are submitted to him directly by interrogatees or by human rights organizations.[253] It should be noted that in his testimony before the Commission, the Mavtan stated that he 'receives the different complaints from various bodies. It can come from lawyers, it can come from one of the various human rights groups, [for example] the ICRC, the Public Committee Against Torture in

251 ATTORNEY–GENERAL GUIDELINE 4.1201 *supra* note 247, at para. 8.

252 It should be noted that meanwhile the Supreme Court handed down a decision on this matter; See: *2011 Public Committee Against Torture* case, *supra* note 194.

253 It should be noted that the ICRC makes regular visits to all of the ISA's interrogation facilities, sends concrete complaints on a regular basis for the ISA's response and submits a periodic report each year with regard to 'The Treatment of Detainees in Interrogation Facilities'. This report is defined as classified, it is not available to the public and is only sent for the response of the relevant authorities.

Israel, B'Tselem'.[254] Moreover, all ISA personnel are instructed to send to the Mavtan any information in their possession that may give rise to a complaint against an ISA interrogator. Thus, complaints are sent to the Mavtan, whether made by an interrogatee to an interrogator, or in court during detention proceedings.[255]

254 *Mavtan's Testimony*, *supra* note 151, at 2.

255 *Id.*, at 3.

E. Method of Conducting the Examination and Investigation in Israel ('How to Investigate?')

The survey of the examination and investigation mechanisms in Israel discussed so far the questions of 'why investigate?', 'what to investigate?', 'who investigates?' and 'what to investigate?'. In this last section we will survey the processes of conducting an examination and investigation in the various mechanisms ('how to investigate?'). Similar to the previous parts, here too we will first discuss the manner in which examinations and investigations are conducted in the IDF, in the police and in the PIID and following this we will discuss the manner in which examinations and investigations are conducted by the Mavtan, the NPWIU and commissions of inquiry.

Method of Conducting the Examination and Investigation in the IDF

86. In surveying 'how to investigate?' in the IDF we will outline chronologically the processes for examinations and investigations. We will first discuss the examination process which starts with the operational debrief mechanisms and is followed by the MAG's decision on whether to open an investigation based on the findings that emerge from the operational debrief. We will then discuss the CID investigation process. The chronology of the process is influenced by the nature of the complaints and claims directed at IDF soldiers. As described above in paragraph 69, according to the current investigation policy, there are two tracks for examining and investigating complaints and claims of violations of international humanitarian law. The first track is the immediate investigation track, which is opened following claims relating to events that take place in the West Bank, in the course of the IDF's ordinary law enforcement operations, and following complaints of acts constituting a

violation of absolute prohibitions that cannot be justified even within the framework of the conduct of hostilities. The second track involves the MAG deferring the decision on whether to open an investigation until he receives the findings of an operational debriefing, upon which he will determine whether there is a suspicion for criminality.

87. Information concerning violations of international humanitarian law may reach the MAG through complaints filed by the injured parties themselves or through human rights organizations that represent them, by means of reports in the media or following Israeli or foreign reports of a particular incident,[256] or from the forces operating in the field. According to the Reporting Procedure (see above in paragraph 73), in any case of death or injury to a Palestinian civilian a preliminary report form shall be filled out and sent to the MAG within 48 hours. In addition, an operational debriefing should be prepared and approved by the area commander and sent to the MAG within 21 days, together with the material that was accumulated during its preparation.[257]

The preliminary report is assessed by the MAG Corps for Operational Matters. If the assessment does not give rise to a *prima facie* suspicion of criminality, the decision as to whether to open an investigation is deferred until after receipt of the operational debriefing.

1. The Operational Debrief

88. An 'operational debrief' is an 'inquiry made by the army, based on army orders, concerning an incident that occurred during training or military operations, or with regard thereto'.[258] The status of the operational

256 *MAG Position Paper 2011 – Supplementary Material*, *supra* note 205, at 6.

257 Orders of the IDF's Operations Branch and the Central Commander's Office, *Reporting Procedure*, *supra* note 217.

258 See: The Military Justice Law, at Article 539A(a); SCO 2.0702 *Report that is classified*, at para. 1(b) [hereinafter: SCO 2.0702].

debrief and the manner of preparing it are regulated in section 539A of the Military Justice Law, in SCO 2.0702 *Report that is classified* (hereinafter: SCO 2.0702) and in the orders of the Operations Department – Education and Training Division on the subject of 'Learning, Implementing and Assimilating Lessons' (hereinafter: the Lesson Learning Order),[259] and on the subject of 'Reporting Procedures and Presentation of Operational Reports to the Chief of Staff' (hereinafter: the Reporting Procedures Order).[260]

According to the Lesson Learning Order, an operational debrief is compiled in three stages: assembling and authenticating the facts, identifying the findings that have relevance to the activity being debriefed, and arriving at conclusions.[261] After the operational debrief is completed, on the basis of the conclusions that were reached, a lesson learning process is carried out, in order to implement and disseminate them.[262] The Lesson Learning Order emphasizes the importance of preparing the operational debrief as soon as possible after the debriefed activity and requires that the participants in an operation that may lead to an operational debrief shall keep a written record in which they will describe what happened.[263]

The rules concerning the legal status of the operational debrief, and especially the classified status of the information accumulated during it, are intended to guarantee the credibility of the data collected in the framework of the debrief.[264] The person conducting the debrief is not subject to the

259 Orders of the IDF's Operations Branch, Instruction and Doctrine Division T–29(43), *Learning Lessons, implementation and assimilation* (Sep. 23, 2003) [hereinafter: *The Lesson Learning Order*]. According to SCO 1.0105 *Army Orders, Other General Orders, Standing Orders and Peacetime Orders*, the orders of the Operations Branch – Instruction and Doctrine Division constitute 'other general orders', as these are defined in Article 2A(c) of the Military Justice Law, and they are considered law for the purpose of the Military Justice Law, even though their hierarchical status is lower than that of Supreme Command Orders or Chief of Staff Orders.

260 Orders of the IDF's Operations Branch, Instruction and Doctrine Division 1.6, *Reporting Procedures and Presentation of Operational Reports to the Chief of Staff* (Jun. 18, 2007).

261 *The Lesson Learning Order*, *supra* note 259, at para 8(b).

262 *Id.*, at para. 7.

263 *Id.*, at para. 8(c).

264 *MAG Position Paper 2011 – Supplementary Material*, *supra* note 205, at 15–17.

rules of evidence and he may take testimony from every soldier that was involved in the incident or whose testimony is required for the debriefing, and obtain all relevant documents, including operational orders and plans, operational journals, meeting summaries, professional opinions, aerial photos, video clips, etc. SCO 2.0702 imposes a duty on every soldier who is required to do so, to cooperate and to deliver relevant information in his possession, whether in the form of testimony or in any other way.[265] In an operational debrief process, as distinct from a criminal investigation, the soldiers being debriefed are not entitled to representation by a lawyer, and do not have the right to remain silent or the right not to incriminate themselves. Moreover, making a false statement or concealing an important detail in a process of an operational debrief is an offense under the Military Justice Law, and carries a penalty of imprisonment.[266]

89. The materials of an operational debrief are privileged. According to Article 539A of the Military Justice Law, 'statements made in a debriefing, the debrief report, any other material prepared during it and summaries, findings and conclusions are inadmissible as evidence in a trial'. However, it should be stated that tangible evidence seized during the debriefing may be admissible as evidence in a criminal trial.[267] The Article also provides that 'the debrief material shall not be given to an investigating body' (this includes the CID), and that 'the debrief materials shall be privileged to any person, however, it will be delivered in whole or in part only to those military bodies that need the debrief in order to carry out their duties'.[268] Army orders provide that although the materials of the operational debrief are impermissible evidence in a trial, it is possible to commit a soldier for a disciplinary trial based on its conclusions or to take command sanctions following the debriefing.[269]

265 SCO 2.0702, *supra* note 258, at para. 8–10; *Learning Lessons Order*, *supra* note 259, at para. 8(c).

266 The Military Justice Law, at Article 108(2) and 539A.

267 *MAG Position Paper 2011 – Supplementary Material*, *supra* note 205, at 16.

268 For a discussion of this issue, see: HCJ 2366/05 *Alnabari v. IDF Chief of Staff* (unpublished, Jun. 29, 2008).

269 SCO 2.0702, *supra* note 258, at para. 11; The Military Justice Law, at Article 282.

90. After completing the operational debrief, the findings are submitted to senior officers for approval, i.e., the area commander or the head of the service and in certain cases even the Chief of Staff, and each of them has the power to order the operational debrief to be completed if it contains any deficiency in the facts, findings or conclusions. In certain cases, such as incidents during which uninvolved Palestinian civilians are injured, the debriefing body has a duty to send the operational debrief to the MAG, who is also entitled to request the expansion of the debriefing or a clarification of its findings.[270] It is important to note that as appears from the materials submitted to the Commission the period of time between the occurrence of an incident and the completion of an operational debrief and its submission to the MAG Corps may be very lengthy.[271]

2. The Experts Debrief

91. Apart from the operational debrief that is conducted in the framework of the unit being debriefed, the IDF also has a special process of an experts debrief which is conducted when there are special considerations that justify it, such as the scope of the investigated operation, the variety of forces involved in it or the weapons that were used.[272] The commander of the unit under consideration can take the initiative for conducting an experts debrief and so can his superior officers in the chain of command,

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270 The duty imposed on the person who prepares an operational debrief to deliver the debrief material to the MAG or to his representative is also regulated in SCO 2.0702, *supra* note 258, at para. 14, which lists the following grounds that give rise to the duty:

(a) In every case relating to military operations during which a soldier or someone who is not an enemy is killed or injured;

(b) In a report relating to training exercises in which a person was killed or seriously injured;

(c) In any other case, or in other types of cases, in which the Military Advocate–General or his representative makes such a request.

271 THE SAMPLE EXAMINATION: File 203/10 reveals that the MAG Corps received the debrief six months after the date of the incident; File 279/07 reveals that the MAG Corps received the debriefing approximately ten months after the date of the incident; File 427/07 reveals that MAG Corps requested to receive the debrief five months after the incident (unclear when the debrief was submitted); File 375/09 reveals that the MAG Corps located the debrief two years after the incident. In addition, as part of file 359/07 the Commission came across a summary of a meeting between the MAG and certain General, during which the MAG raised the difficulty of receiving debriefs.

272 For details of the types of cases in which preference will be given to an 'experts debrief' rather than an ordinary debrief, see: *MAG Position Paper 2010*, *supra* note 55, at 70–71.

or the Chief of Staff, and also the MAG, as actually happened, for example, after 'Operation Cast Lead'.[273] Another example of an order for an experts debrief occurred after the maritime incident of 31 May 2010, when the Chief of Staff ordered a report from a panel of experts, which was chaired by Major–General (res.) Giora Eiland, a former head of the Operations Department, the Planning Division and head of the National Security Council.[274]

An 'experts debrief' is conducted by individuals that are outside the unit being debriefed. According to the Lesson Learning Order, the individuals must be experts in the professional areas relevant to the case and familiar with the nature of the unit being investigated, its assignments and the roles of the unit's officers. Also, the experts cannot have taken part in the operations under consideration.[275]

3. Decisions Based on the Operational Debrief

92. After it is completed, the operational debrief is sent to the MAG Corps, in order for a decision to be made about whether to open an investigation into the incident. The MAG Corps for Operational Matters reaches an opinion about opening an investigation, and the MAG holds a 'debrief meeting', the purpose of which is to determine whether to open an investigation into the various incidents. It should be noted that the MAG's decisions on whether or not to open investigations are not always provided with written explanations.[276]

273 *The Public Commission for Examining the Maritime Incident of May 31, 2010* (Position Paper of the MAG Corps submitted to the Turkel Commission, Jul. 29, 2010).

274 *Winds of Heaven 7* (General Staff Expert Report of Giora Eiland, Jul. 11, 2010); See: THE COMMISION'S FIRST REPORT, *supra* note 101, at para. 9.

275 *Learning Lessons Order*, *supra* note 259, at para. 8(e)(2).

276 See for example: THE SAMPLE EXAMINATION: file 359/07 and file 377/10.

93. When the debrief's material reveals a suspicion that an offense has been committed, and prior to the MAG ordering the initiation of an investigation, he must consult with the commander responsible for the unit involved in the incident, whose rank is, at least, Major–General.[277] The purpose of this consultation is to ensure that the relevant operational circumstances are brought to the attention of the MAG. Nonetheles, the MAG retains his sole discretion regarding the decision to open an investigation.[278]

4. CID Investigations

94. CID investigations are criminal investigations. A CID investigator is entitled to take testimony from any person and to take possession of any object that is required for the purpose of carrying out an investigation.[279] Among the various actions carried out by the CID, it should assemble as many details as possible about the incident, including the location and time of the incident, the persons involved in it, etc.[280] In the course of its work, the CID works with army personnel in order to locate the incident that is being investigated, the unit relevant to the incident (sometimes incidents occur on the border between areas where various units operate), to identify the specific force that operated at the site, etc. The CID is also authorized to collect testimony anywhere in the country (at IDF camps, at CID bases, at police stations or various offices).[281] The CID is also entitled to obtain assistance from additional bodies in order to make progress in

277 The Military Justice Law, at Article 539A(b)(4)(b).

278 See: *MAG Position Paper 2010*, *supra* note 55, at 17; *Meeting with MAG, supra* note 223, at 7.

279 The Military Justice Law, at Article 256.

280 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 5.

281 *Id.*, CID annex, at 6; In this context, it should be noted that after Operation Cast Lead, it was alleged in the media that in several cases preliminary testimonies were taken from soldiers at cafés or restaurants. According to the MAG, these cases were rare and only involved cases of taking statements (and not investigation) from soldiers who at the time of taking the testimony had already been discharged from the army. The MAG stated that the MAG Corps were not involved *ab initio* in the decision, but in view of various investigation considerations and mainly the desire to obtain the cooperation of the witnesses, it did not appear that there was any impropriety in this practice in this specific context. It is important to point out that the investigation of suspects (as opposed to the obtaining of statements) was carried out only at IDF bases. *Meeting with MAG*, *supra* note 223, at 5.

the investigation (for example, receiving photographs from Air Force units, intelligence and the ISA), and requesting expert opinions in order to clarify issues that require technical or other expertise (such as questions relating to a particular weapon).[282]

In addition, the CID makes contact with the complainant (usually through human rights organizations) in order to obtain relevant information in his possession (such as death certificates, medical documents, property damage reports, pictures and photographs, receipts, etc.) and to obtain his testimony.[283] According to the material submitted to the Commission by the CID, the testimonies are obtained at the checkpoints between Israel and the West Bank or the Gaza Strip, or near the checkpoints, in rooms designated for this purpose.[284] As can be seen from the CMPC's testimony, recently statements have been taken by CID investigators that speak Arabic (according to the CMPC, however, further progress can still be made in this regard).[285] Furthermore, from the material submitted to the Commission by the human rights organization Yesh Din, that represent complainants, a number of difficulties in collecting the testimonies were highlighted, including arranging the meetings, a shortage of interpreters that speak Arabic, finding suitable places for taking the testimony, and the presence of persons in addition to the investigators when the testimonies are taken, which may deter the complainant from giving his testimony.[286]

95. From materials that the CID Commander submitted to the Commission, it appears that most of the complaints received by the CID relating to violations of international humanitarian law concern cases of violence or looting that took place during routine security operations in the

282 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 6.

283 *Id.*

284 *Id.*

285 *CMPC's Testimony*, *supra* note 86, at 17–18.

286 *Alleged Investigation Report*, *supra* note 238.

West Bank. Recently, the CID has especially dealt with complaints regarding damage caused by the IDF's activity during 'Operation Cast Lead'.[287]

Moreover, the MAG argued before the Commission that investigations relating to violations of international humanitarian law in cases that occur during combat 'pose before the CID many and various challenges'.[288] He contended that:

> the scene in which the crime was (ostensibly) committed, is located – generally – outside the territory of the State of Israel, and in many cases *even in an area controlled by an enemy state (South Lebanon) or by hostile parties (the Gaza Strip*). This fact significantly limits and sometimes totally thwarts the capability of the investigators to visit the sites and gather physical evidence located at the site. Furthermore apprehension also exists that parties wishing to accuse the IDF of committing war crimes will "*plant*" *fictitious evidence at the scene.*
>
> An additional difficulty derives from the fact that in many cases, *the fighting itself leads to the destruction of the evidence*... A third difficulty is connected with *finding eyewitnesses to the incidents* (aside from the soldiers themselves)...
>
> Likewise, difficulty frequently arises already at the preliminary stage *of identifying the location where the incident took place and the force that was involved in it*...
>
> Finally, even when the location and the force involved were identified, *difficulty exists in getting a uniform and clear version*... because the operational circumstances and the "fog of war" influence.[289]

According to the CID Commander these files are 'sensitive and complicated

287 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 5.

288 *MAG Position Paper 2010*, *supra* note 55, at 4. See also: *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 1 (paras. 4–5).

289 *MAG Position Paper 2010*, *supra* note 55, at 4–5.

investigation files, which require intensive work by the investigation teams that handle them'.[290] Because of this complexity, the MAG Corps for Operational Matters usually accompany the CID in these investigations.[291] It is important to note that every CID base that deals with investigations of violations of international humanitarian law has a contact in the MAG Corps that provides professional advice.[292] In October 2009, after Operation Cast Lead, and following the opening of many investigations, a special investigation team within the CID was set up, under the command of an officer with the rank of lieutenant–colonel and with six other officers, two Non–Commissioned Officers and 12 soldiers (which also included Arabic interpreters).[293] For the purpose of supervising the investigations, situation assessments were also made by a team led by the MAG, the CMP, the CMPC and the CID Commander.[294]

96. When the CID has finished its handling of a case, it is referred to the MAG Corps for a decision about further handling.[295] Cases involving alleged violations of international humanitarian law are referred to the MAG Corps for Operational Matters which is already involved in the handling of the case from the investigation stage.[296] The MAG Corps is authorized to close the investigation file, to complete the investigation, to refer the case to another investigating authority (for example, when there is no connection to the army or the Military Justice Law does not apply), or to file an indictment against the suspects.

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290 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 1.

291 *Id.*, at 2, para.11.

292 *Id.*, at 3.

293 *Id.*, at 6.

294 *Id.*

295 General Staff Order 33.0304, *supra* note 89, at para. 63, provides that only a military advocate is competent to give approval to the CID not to carry out an investigation or to close an investigation file after it has been opened. It should be noted that from the letter of the CID Commander it can be seen that currently the General Staff are working on amending this order, so that the CID authorities will have power to close investigation files by themselves in certain cases, without referring the case to the MAG Corps, after consulting an advocate. However, it was stated there that this does not refer to cases that contain claims of violations of international humanitarian law (see: *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 3, *fn* 6).

296 *MAG Position Paper 2010*, *supra* note 55, at 4.

97. The procedures of the MAG Corps, including the MAG Corps for Operational Matters, provide that when it receives a power of attorney from a suspect or defendant giving notice of legal representation, it is obliged to notify the attorney of the stages of handling the case. The material presented before the Commission showed that in many cases the MAG Corps tends to send the information about the stage of handling to human rights organizations, if they request the information, even if there is no power of attorney for legal representation in the file.[297] However, it appears that sometimes a significant period of time passes until a response is given to the complainants or the human rights organizations.[298]

98. According to information submitted to the Commission by the CID, more than 3,000 in average, investigation files are opened by the CID in each work year, for all types of alleged offenses. In 2008, shortly after the MAG Corps for Operational Matters was established, 3,500 investigation files were opened by the CID, of which approximately 323 files were opened for complaints of violations of international humanitarian law (out of 432 complaints). In 2009, 236 investigation files (out of 415 complaints), were opened for complaints of violations of international humanitarian law (some of which were complaints relating to Operation Cast Lead) and in 2010, more than 140 investigation files (out of 201 complaints) were opened as noted (some of which were complaints relating to Operation Cast Lead).[299] Most of the files were opened following complaints by residents from the West Bank and the Gaza Strip against IDF soldiers for routine security operations. According to figures that were submitted to the Commission by the MAG, a total of 52 investigation files were opened by the CID following Operation Cast Lead, of which seven investigations are still pending.[300] After the maritime incident of 31 May 2010, the CID opened investigations

297 *Meeting with MAG*, *supra* note 223, at 6.

298 For an example of this, see: THE SAMPLE EXAMINATION: File 359/07.

299 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 1.

300 Letter from Major Roni Katzir, MAG Corps, to Hoshea Gottlieb, the Commission's Coordinator, *Investigation Data Regarding Cast Lead events* (Jun. 28, 2012).

against 18 suspects for various incidents of theft of property belonging to flotilla participants by IDF soldiers (as distinct from the claims concerning the actual operation of taking control of the flotilla, which were examined in an experts debrief headed by Major–General (res.) Eiland, and by this Commission). Out of all the investigations that were opened, indictments have been filed against eight soldiers.[301]

Method of Conducting the Examination and Investigation in the Police

99. The Israel Police (Judea and Samaria District) deal with claims of violations of international humanitarian law that occurred during incidents of shooting by police officers in the West Bank (apart from certain categories of police officers described above in paragraph 44).[302] In surveying the question of 'how to investigate?' into police conduct, we will outline the processes for examinations and investigations. We will first discuss the examination process which includes the police operational debrief and its transfer to the Deputy State Attorney (Criminal Matters) in order to make a decision on opening an investigation. We will then discuss the investigation process in the Judea and Samaria District Police. As noted above in paragraph 46, in practice, however, investigations are also opened without a decision by the Deputy State Attorney (Criminal Matters) and sometimes police operational debriefs are not conducted.

1. The Police Operational Debrief

100. A police operational debrief is regulated in the Police Law (Disciplinary Law, Assessing Police Complaints and Other Instructions)

301 Letter from Major Roni Katzir, MAG Corps, to Hoshea Gottlieb, the Commission's Coordinator, *Investigation Data Regarding the Marmara Events* (Aug. 13, 2012). See also: The Commission's First Report, *supra* note 101, at para. 160; *MAG Position Paper 2010*, *supra* note 55, at 83–84.

302 *Summary of Meeting regarding the Investigation of Shooting Incidents in the Area around Jerusalem*, *supra* note 135.

2006 (hereinafter: the Police Law) and in an operational procedure of the Border Police 'Conducting an Operational Debrief' (hereinafter: the debrief procedure).[303] The Police Law defines a police operational debrief as 'an assessment conducted in the Israel Police in accordance with procedures by the Chief Commissioner or on his behalf concerning an incident that occurred during operational activity'.[304] According to the debrief procedure: following every incident in which a weapon is used 'a debrief will be conducted by the commander of the force, as a rule, and by the level that commands him (by decision)'.[305] However, 'in an incident in which an individual was injured from the use of force or a weapon... a debrief will be conducted only after obtaining approval of the PIID'.[306] The debrief procedure provides that the debriefing must be conducted 'as close as possible to the incident... while ensuring the reliability of those carrying out the debrief and those being debriefed'.[307] The police operational debrief must be completed in writing on a 'debrief form' and transferred to the commanding levels in the Border Police.[308]

101. The rules concerning the legal status of the police operational debrief, and especially the classified status of the information accumulated during it, are regulated in the Police Law similar to the way the IDF operational debrief is regulated in Article 539A of the Military Justice Law (see above in paragraph 89).[309]

2. Decisions Based on the Police Operational Debrief

102. The Police Law provides that 'the debrief material concerning specific

303 *The debrief procedure*, *supra* note 141.

304 The Police Law, at Article 102(a).

305 *The debrief procedure*, *supra* note 141, at Article 4A1; annex A, Article 1I.

306 *Id.*, at annex A, Article 2.

307 *Id.*, at Article 4.

308 *Id.*, at annex C.

309 The Police Law, at Article 102(a); See also: *Police and Army debriefs' status on the criminal procedure* (order of the Deputy State Attorney (Criminal Matters), Aug. 5, 2008).

incidents or concerning types of incidents should be handed to the Attorney–General or to whomever he authorizes, upon his request'.[310] It further provides 'if the Attorney–General or a person authorized by him, finds that the debrief material reveals a suspicion for the commission of a crime that justifies an examination or an investigation he may... after consulting with the Chief Commissioner, order in writing, an investigatory body to open an examination or investigation'.[311] In this context, the Attorney–General authorized the Deputy State Attorney (Criminal Matters) to be the main figure in charge of this matter.[312] According to a guideline of the State Attorney to the Israel Police, the debriefs must be submitted to the Deputy State Attorney 'within 21 days at most'.[313] It appears that in practice this guideline is not followed.[314] In addition, the police operational debriefs are not always conducted even when they are required by the debrief procedure (see above in paragraph 46).

It should be noted that in 2007 the Deputy State Attorney (Criminal Matters) adopted a 'work procedure' according to which, prior to his decision to open an investigation and before he consults with the Chief Commissioner, he will send the police operational debrief to the MAG in order to get his views on the matter. The MAG, in turn, will consult with the General of the command where the police operation took place. The views of the MAG and of the General of the command will be considered by the Deputy State Attorney when he makes his decision on whether to open an investigation.[315] The work procedure was adopted in an attempt to minimize the discrepancies between the MAG's reliance on the operational

310 The Police Law, at Article 102(b)(4)(a).

311 *Id.*, at Article 102(b)(4)(b).

312 *State Attorney's letter about Police Investigation Material*, *supra* note 140.

313 *Id.*

314 *Meeting with the Deputy State Attorney (Criminal Matters)*, *supra* note 228.

315 *Debriefs of Border Police shooting incidents* (summary of a meeting that took place on 19 July 2007, at the office of the Deputy State Attorney (Criminal Matters), Yehoshua Lemberger, Jul. 26, 2007); Letter from Yehoshua Lemberger, the Deputy State Attorney (Criminal Matters), to Colonel Liron Libman, the Chief Military Prosecutor (Aug. 27, 2007); See also: *Police Debriefs* (summary of a meeting that took place on 28 July 2009, at the office of the Deputy State Attorney (Criminal Matters), Yehoshua Lemberger, Oct. 15, 2009).

debrief concerning IDF incidents and the Deputy State Attorney (Criminal Matters') reliance on the police operational debrief concerning police incidents.

3. Police Investigations

103. Police investigations of shooting incidents in the West Bank are conducted like ordinary investigations in the course of their routine activity (in terms of their authority to collect evidence, take testimonies, etc.), however, they are also subject to a specific procedure by the Investigations and Intelligence Department of the Israel Police which deals with 'shooting incidents in the West Bank in which civilians are injured' (hereinafter: police procedure for shooting incidents in the West Bank).[316] According to the procedure an initial investigation will be carried out at the responsibility of the commander of the relevant investigating station. In the framework of this investigation, the station will handle the following issues:

a. The scene of the incident (collecting evidence, documentation, etc.).
b. Investigating the injured person and witnesses (including police officers) about the involvement of the injured person in the incident.
c. Identifying the body, in a case of an injury that led to death, and sending it to the National Center for Forensic Medicine in order to investigate the cause of death.
d. Completing the investigation on the basis of the managerial debrief report of the local division or the Border Police company commander.[317]

104. After these actions are completed, it is the responsibility of the commander of the relevant investigating station to transfer the findings

316 IID GUIDELINE 03.300.071, *supra* note 141.
317 *Id.*

to a district investigation team, which 'receives, as soon as possible, the initial investigation material which was collected by the police station as well as the operational debrief prepared by the Border Police... and any other material relevant to the incident in the Border Police's possession (operational journals), police reports, etc.'.[318] The district investigation team carries out its own investigation operations, which include collecting relevant exhibits (such as weapons and ammunition), taking testimony from police officers and other witnesses and obtaining forensic findings. At the end of the investigation, the investigation team should prepare a detailed summary of the evidence and the material in the case, and reach a conclusion as to whether there is a suspicion of a criminal or disciplinary offense. Subsequently, the investigation file is sent to the investigating officer in the Judea and Samaria District, who gives his opinion and sends it to a prosecutor in the District Prosecution (civilian).[319]

105. It should be noted that the police are subject to the Rights of Victims of Crime Law,[320] which places, *inter alia*, a duty to transfer to the victim of a crime, or to his family, information regarding the criminal proceedings.

106. The complainant may appeal against a decision to refrain from investigating or indicting to the Director of Appeals in the State Attorney's Office who is subordinate to the Deputy State Attorney (Criminal Matters).[321]

107. In response to the Commission's request to receive information about files that were opened by the police concerning alleged violations of international humanitarian law, it was informed that the police do

318 *Id.*

319 *Id.*

320 Rights of Victims of Crime Law, 5761–2001, LA 1782.

321 The Criminal Procedure Law, at Article 64.

not document the source of the complaint. This is important because the identity of the complainant impacts upon the classification of the complaint as a violation of international humanitarian law. Therefore, it was not possible to state the number of files investigated by the police that relate to complaints of violations of international humanitarian law.[322]

Method of Conducting the Examination and Investigation by the PIID

108. Generally, the PIID investigates claims and complaints directed at police officers.[323] When the PIID receives a complaint or information that gives rise to a suspicion of criminal conduct, an initial examination of the complaint or the information is made by an attorney (prosecutor). When he decides to open an investigation, the attorney sends the complaint or the information to one of the PIID's investigation teams. The PIID investigators have an intelligence division and also technological abilities identical to those of the Israel Police. However, the PIID does not have a forensic science department and it uses the police's forensic science department.[324] Since the PIID investigators do operate in the West Bank, their investigations of Palestinian complainants that are residents of the West Bank usually take place at the District Coordination and Liaison Offices, whereas the investigation of the police officers against whom the complaints were made takes place at the PIID's offices.[325]

109. At the end of an investigation, the file is transferred to an attorney in the PIID, who examines the materials and based on them recommends

322 *Meeting with the Deputy State Attorney (Criminal Matters)*, *supra* note 228.

323 See *supra*, at paras. 43–44; On the PIID's authority to investigate ISA employees, see para. 49.

324 *Meeting with the Head of the PIID*, *supra* note 132, at 2.

325 See: *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 5.

to the department management to either file an indictment, transfer the case to a disciplinary track or close the file. A decision to file an indictment is made by the head of the department or his deputy, whereas a decision to close the case can also be made by a senior attorney in the department.[326]

110. It should be noted that the PIID is required to transfer information about any criminal proceedings to the victims of the crime as set out in the Rights of Victims of Crime Law. According to materials that the Commission received, it appears that in the case of Palestinian victims of crime, the department sometimes enlists the assistance of human rights organizations in order to carry out its duties under the law.[327]

111. It is possible to file an appeal against a decision to refrain from investigation or indicting.[328] The appeal is examined by the Appeals Department at the State Attorney's Office, which is subject to the Deputy State Attorney (Criminal Matters).

112. Similar to the police, the PIID does not document the source of the complaint, the identity of the complainant or the offense alleged in the complaint in a manner that allows monitoring and the creation of a statistical database on alleged violations of international humanitarian law. However, according to the Deputy State Attorney (Special Assignments), it is rare that the PIID handles complaints and claims concerning alleged violations of international humanitarian law.[329]

326 *Id.*

327 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 5.

328 The Criminal Procedure Law, at Article 64.

329 *Deputy State Attorney (Special Assignments) – Position Paper*, *supra* note 129, at 6.

Method of Conducting the Examination and Investigation by the Mavtan

113. The process of handling complaints and claims directed at ISA investigators begins with the Mavtan. Upon receiving a complaint the Mavtan meets the complainant and this meeting is conducted in Arabic and is recorded and documented. According to the State Attorney's guidelines, the meeting is held without the presence of a lawyer on behalf of the complainant.[330] The Mavtan also assesses material relating to the complainant's interrogation by the ISA, including meetings between the interrogatee and medical personnel and the documentation of their findings. He questions ISA personnel involved in the case, and assesses the conduct of the interrogation as documented in the ISA's internal database, to which he has access. In cases where the Mavtan is unable to meet with the complainant (for example, because the complainant has been released from custody and refused to respond to his request), the investigation is based on documents in the Mavtan's possession.[331]

114. At the end of the Mavtan's assessment, he sends the file, which includes a summary of his finding to the Mavtan's Supervisor at the State Attorney's Office. The Mavtan's Supervisor formulates a recommendation on whether there is a basis for opening a criminal investigation, whether it should be referred to disciplinary proceedings, whether the matter should be assessed further or whether the file should be closed. The recommendation is submitted to the Attorney–General (or to whomever he delegated the authority). There are cases in which the Mavtan's Supervisor recommends that procedures should be changed.[332]

115. In principle, if a decision is made to open a criminal investigation,

330 *Mavtan's Testimony*, *supra* note 151, at 6.

331 *Id.*, at 15.

332 *Id.*, at 24.

the file is passed to the PIID, where the case is handled in the same way as other cases by the PIID, and at the end of the investigation a decision is made whether the ISA interrogator must be indicted. The material that was brought before the Commission reveals that in practice, since the Mavtan was established in 1992, over 700 complaints have been filed and not a single criminal investigation has ever been opened against an ISA investigator.[333]

Method of Conducting the Examination and Investigation by the NPWIU

116. The NPWIU is a unit in the Israel Police that is responsible for investigating complaints and claims directed at the Israel Prison Service personnel. The handling of complaints and claims directed at wardens is regulated in the police procedure for handling offenses by wardens.[334] According to the procedure, the head of the NPWIU is authorized to order an 'initial examination' of the complaint before he decides whether to continue handling it, and he may be assisted by the Prisoner Complaints Officer at the Ministry of Public Security for the purpose of this examination.[335] The procedure emphasizes the need for urgent handling of complaints of the unlawful use of force by the Israel Prison Service personnel, and it provides that the complaint should be heard quickly and 'external signs of the use of force on the body of the complainant' should be documented in writing and in photographs.[336] This assessment can also be done by the local investigation unit at the Israel Prison Service personnel facility.

333 See: Transcript – Part B, session no. 11 "Testimony of the Israel Security Agency Chief" 15 (Apr. 12, 2011); See also: *Above Criticism: The Lack of Investigations and Sanctions for Torture and Abuse in ISA Interrogations* 31–32 The Public Committee against Torture in Israel (Dec. 2009).

334 IID Guideline 03.300.039, *Supra* note 242.

335 *Id.*, at Article 2A(7).

336 *Id.*, at Article 2A(8).

117. Recently the NPWIU was connected to the computer system of the Israel Prison Service, so that it has access to the current database of wardens and inmates.[337] Moreover, it is currently being considered whether the unit can be directly connected to the Israel Prison Service's security cameras in order to allow it to examine the events that it is investigating directly.[338] At the end of the NPWIU's investigation, the file is sent to the State Attorney's Office with a recommendation of the unit.

118. According to the information submitted to the Commission, there are no figures for complaints concerning suspected violations of international humanitarian law. The Commission was, however, given the figures on complaints and investigations that relate to all the prisoners in the custody of the Israel Prison Service, which include both security prisoners and criminal prisoners.[339]

Method of Conducting the Examination and Investigation by Commissions of Inquiry

119. In the following section we will discuss the method of conducting the examination and investigation by the various commissions of inquiry, beginning with State commissions of inquiry, followed by government commission of examination and ending with a commission of assessment.

1. State Commissions of Inquiry

120. As stated above in paragraph 55, according to the Commissions of Inquiry Law, the composition of the State commission of inquiry is

337 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 9.

338 *Id.*, at 10.

339 *Id.*

determined by the President of the Supreme Court.[340] The commission of inquiry is headed by a justice of the Supreme Court or a District Court.[341] In its decision to set up the commission, the Government defines the subject matter of the inquiry, and it is entitled, at the request of the commission, to clarify, extend or restrict the subject matter of the inquiry.[342] Commissions of this type have extensive powers. The law provides that a commission of inquiry is not required to act in accordance with the rules of procedure of the courts; for example, it may admit evidence in any manner that seems to it advantageous and determine the procedures for examining witnesses.[343] It may summon witnesses to testify and the obligations of any such witness will be the same as those of a person investigated according to section 2 of the Criminal Procedure (Testimony) Ordinance,[344] and it may issue a search warrant.[345] If a State commission of inquiry reaches a conclusion that there is a suspicion of a violation of international humanitarian law or that any other criminal offense has been committed, it should refer its findings to the competent authority so that it may order the opening of a criminal investigation (the Attorney–General or the MAG, as applicable).[346]

A commission of inquiry publishes its report shortly after submitting it to the Government. However, it may decide not to publish the report, in whole or in part, if it is persuaded that this is necessary in order to prevent real harm to State security, its foreign relations, one of its essential economic interests, the safety or privacy of an individual, or the classified methods in which an authority or body that has investigative powers under

340 The Commissions of Inquiry Law, at Article 4(a).

341 *Id.*, at Article 4(b).

342 *Id.*, at Article 2.

343 *Id.*, at Article 8.

344 *Id.*, at Article 10.

345 *Id.*, at Article 12.

346 An example of a State Commission of Inquiry whose findings led to the opening of a criminal investigation is the Commission of Inquiry regarding the Bank Share Manipulation (The Bejski Commission), which was set up by the State Control Committee of the Knesset, following the filing of the State Comptroller's report. For further detail, see CA 2910/94 *Yafet v. State of Israel*, 50(2) 221, 253 (1996).

the law operates.[347] Moreover, the Commissions of Inquiry Law provides arrangements relating to the publication of transcripts of the commission's sessions and regarding the possibility of determining provisions and restrictions upon the public's ability to inspect the commission's material.[348]

2. Government Commission of Examination

121. A minister that appointed a commission of examination of a certain issue or incident within his sphere of responsibility may, after obtaining the Government's approval, ask the Minister of Justice to determine that such a commission will have powers of a State Commission of Inquiry (powers to summon witnesses, to compel them to testify, to compel them to appear before it and to impose sanctions on persons who refuse to testify).[349] Similarly, testimony before the commission, and the commission's report, may not be admitted as evidence in a legal proceeding.[350]

According to the Government Law, 'No person may be appointed or act as a member of a Government commission of examination if he may find himself, directly or indirectly, in a situation of a conflict of interest between his position as a member of the commission and any other position that he holds or any other personal interest'.[351] The law further provides that 'if a Government commission of examination finds that there is a suspicion that a criminal offense has been committed, it should bring the matter to the attention of the Attorney–General'.[352] A Government commission of examination submits its report to the minister that appointed it, who submits the report to the Government.[353]

347 The Commissions of Inquiry Law, at Article 20.

348 *Id.*

349 *Id.*, at Articles 9–11 and 27(b).

350 *Id.*, at Articles 14, 22; See also: The Government Law, at Article 8A(a).

351 The Government Law, at Article 8A(b).

352 *Id.*, at Article 8A(d).

353 *Id.*, at Article 8A(e).

3. Commission of Assessment

122. The Commissions of Inquiry Law states that 'there is nothing in this law that derogates from the powers of a minister to appoint a commission of assessment in order to examine an issue under his responsibility'.[354] A commission of assessment is mainly an administrative tool, which is intended, *inter alia*, to find administrative or organizational flaws; it is not intended to lead to legal proceedings (although this may be one of the consequences of this assessment).[355]

123. Where a commission of assessment has begun its activity and a suspicion of criminal conduct arises, the matter should be brought to the attention of the Attorney–General, and the commission's work should be stopped until the assessment is completed, in order to prevent any undermining of the criminal investigation. If it is decided nonetheless to continue the activity of the commission of assessment, the commission will focus on issues of an administrative or professional nature; in determining the framework of the commission's functions, the extent to which the areas of its investigation are removed from the criminal aspect will be considered.[356] As a rule, when there is no exception according to the Freedom of Information Law or any other law, the authority is liable to make the report of the commission of assessment available for the review of anyone requesting it.[357]

354 The Commissions of Inquiry Law, at Article 28A. See also: *Internal Commissions of Investigation*, Attorney–General Guideline 4.2301 (2003) [hereinafter: Attorney–General Guideline 4.2301].

355 Attorney–General Guideline 4.2301, *supra* note 354, at para. 1.

356 *Id.*, at Article b2(a).

357 It should be noted that there are special arrangements regarding the proceedings of a commission of medical examination, see: *Id.*, at para. c(3).

CHAPTER D: DO THE EXAMINATION AND INVESTIGATION MECHANISMS IN ISRAEL CONCERNING COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW CONFORM TO ISRAEL'S OBLIGATIONS UNDER INTERNATIONAL LAW?

INTRODUCTION

1. This chapter asseses whether the examination and investigation mechanisms in Israel dealing with complaints and claims regarding violations of international humanitarian law (see Chapter C of the Report) conforms with Israel's obligations under international law (see Chapter A of the Report). The chapter will also present the Commission's conclusions and recommendations. Throughout this chapter certain practices of the countries surveyed in Chapter B of the Report will be presented for comparative purposes.[1]

The analysis in this chapter parallels the structure of the analysis in the proceeding chapters: first, we will examine whether the offenses under Israeli domestic law correspond with the relevant violations of the international humanitarian law that require an investigation ('what to investigate?'). Second, we will compare the rules and practices in Israel that outline the grounds for establishing the obligation to investigate with the requirements of international law ('when to investigate?'). Finally, the Commission will assess the methods for conducting an examination and investigation in Israel according to the rules of international law ('how to investigate?'). Within the framework of assessing the methods, we will also assess the conformity of the investigative bodies in Israel to the requirements under international law.

1 It should be noted that reference to the comparative survey in this chapter is intended to point out where there is a need for regulation and not necessarily to replicate the practice of the States.

2. In this chapter, the Commission will mainly focus on the central claims raised in the testimonies and the documents that were submitted to the Commission and that were presented in various international fora and reports. Naturally, most of the claims regarding the examination and investigation mechanisms are raised against the Israel Defense Forces (hereinafter: the IDF) which is the central security branch engaged in combat. Accordingly, a large part of this chapter will be devoted to the IDF mechanisms. However, as stated in Chapter C, complaints and claims of violations of international humanitarian law (such as complaints of torture, looting, abuse or other serious violations) may also be raised against other security branches, such as the Israel Police, the Israel Security Authority (hereinafter: the ISA), and the Israel Prison Service. Therefore, the Commission will also examine the manner in which these branches operate when they examine and investigate complaints and claims of violations of international humanitarian law.

3. At the outset, it should be noted that States have broad discretion when selecting tools and mechanisms to fulfill their obligations under international law, in order to accomodate their distinct constitutional and legal institutions. Therefore, when the Commission is of the view that there is room to change a mode of operation of the Israeli examination and investigation mechanisms it does not necessarily indicate flaws in the past, but rather it signifies the Commission's aspiration to pave a way towards best practice in this field in the future.

A. The Normative Provisions in Israel that Define the Violations of International Humanitarian Law that Require Examination and Investigation ('What to Investigate?')

4. In this section of the chapter, the Commission will compare the criminal offenses in Israel *which may be investigated*, to international humanitarian law violations *which require investigation*. Within this framework, the Commission will focus on the question of whether Israel must adopt in its legislation offenses of 'war crimes' and legislation imposing 'criminal responsibility of military commanders and civilian superiors'.

Recommendation No. 1: 'War Crimes' Legislation

5. As noted in Chapter A, the rules of international humanitarian law require countries to enact legislation enabling effective penal sanctions for anyone committing a war crime or instructing its execution.[2] This requirement refers to the investigation of acts that are suspected of constituting serious violations of international humanitarian law.[3]

6. As outlined in Chapter B, the countries surveyed have adopted domestic criminal legislation which characterizes war crimes as unique offenses: in the penal codes of the United States and Canada, there are offenses of war crimes; in these countries the offenses are defined by reference to relevant treaties.[4] The UK penal code has legislation incorporating

2 See: Chapter A, para. 24 and para. 33, *fn* 114.

3 See: Chapter A, paras. 25, 41; throughout this chapter (Chapter D) the term 'violations of international humanitarian law' also covers 'serious violations'.

4 See the United States 18 U.S.C. § 2441(c): 'Definition. – As used in this section the term "war crime" means any conduct – (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the

offenses of war crimes, crimes against humanity and genocide as defined in the Rome Statute, as well as a separate offense regarding the commission of serious violations of the Geneva Conventions and the First Additional Protocol.[5] Australia and Germany have legislation which defines offenses that are similar or identical to those in international criminal law.[6] The Netherlands has identical offenses to those defined in the Rome Statute even though the term 'war crimes' does not appear in its penal code. Its legislation also prohibits violations of the Geneva Conventions and the First Additional Protocol and other violations of the laws and customs of war.[7]

7. As noted in Chapter C, the only explicit reference to the term 'war crimes' in Israeli legislation is in the Nazis and Nazi Collaborators (Punishment) Law, 5710–1950.[8] In Israel, violations of international humanitarian law are indicted through offenses listed in Israeli law, in particular, the Penal Law, the Military Justice Law and in relevant command regulations.[9] If there is no domestic criminal law to which a soldier may be held accountable, it is possible to use a 'basket' offense, according to General Staff Order 33.0133. This Order requires IDF soldiers to act according to the Geneva Conventions.[10] Therefore, where the behavior of a solider or of a commander is contrary to the Conventions he may be indicted for violating the General Staff Order.

Use of Mines, Booby–Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians' (See Annex C: *The US Report*, at paras. 8–9); See the Canadian Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24): 'An act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission'. Canadian law also clarifies that: 'The crimes described in Articles 6, 7 and 8(2) of the *Rome Statute* are crimes according to customary international law' (See Annex C: *The Canadian Report*, at paras. 9–11).

5 See: Chapter B, para. 10; See also Annex C: *The UK Report*, at para. 1.14.

6 See: Chapter B, *Id.*; See also Annex C: *The Australian Report*, at para. 4; *The German Report*, at paras. 110–111.

7 See: Chapter B, *Id.*; See also Annex C: *The Netherlands Report*, at para. 8.

8 See: Chapter C, para. 9.

9 See in detail: Chapter C, paras. 10, 12.

10 Chapter C, para. 12.

8. The question of whether there is a need for domestic legislation that defines war crimes was raised in testimonies before the Commission. Professor Yuval Shany and Dr. Amichai Cohen (hereinafter: Shany and Cohen) pointed out that the list of crimes in Israeli law is only partial and does not include all acts defined as war crimes under international humanitarian law.[11] Furthermore, a representative of the Association for Civil Rights in Israel claimed that offenses in Israeli law – both the 'regular' offenses and the 'basket' offenses – do not reflect the severity of the violations under international humanitarian law.[12]

In response to these claims, the Attorney–General stated that 'in practice, Israel's criminal law is to a great extent commensurate with the offenses stipulated by international law'. He provided the example of 'the offense of murder… which encompasses acts constituting murder as a crime against humanity'.[13] The Attorney–General further noted that 'the Ministry of Justice has, over the years, monitored developments in international law', and 'assessed these developments against Israel's obligations' and the practices of various States 'in incorporating international crimes into their domestic legal system'.[14]

9. In order to adhere to the requirements of international law 'to enact any legislation necessary to provide effective penal sanctions' for those committing war crimes, the Commission is of the opinion that it is

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11 Transcript – Part B, session no. 9 "Testimony of Yuval Shany and Amichai Cohen" 23–25 (Apr. 14, 2011); Yuval Shany, Amichai Cohen & Ido Rosenzweig, *Response Document by the Investigators for the Israel Democracy Institute's 'Terrorism and Democracy' Project to the Position Paper Presented to the Commission by the Military Advocate–General Regarding the Investigation of International Humanitarian Law Violation Allegations* 24 (Feb. 10, 2011) [hereinafter: *Shany, Cohen & Rosenzweig, Response Paper to MAG*]; As well as: Transcript – Part B, session no. 8 "Testimony of Eyal Benvenisti" 7–9 (Apr. 14, 2011) [hereinafter: *Benvenisti testimony*].

12 Transcript – Part B, session no. 2 "Testimony of the Association for Civil Rights in Israel" 2 (Apr. 11, 2011); *The Absence of Criminal Law to Prosecute Violations of the Laws of War* 6 (position paper by the Association for Civil Rights in Israel, Oct. 25, 2011).

13 See: letter from Yehuda Weinstein, Attorney–General, to Justice (ret.) Jacob Turkel, Chair of the Commission, *Completion of Attorney–General's Testimony Before the Commission of 10 April 2011* (Sep. 27, 2011) [hereinafter: *Attorney–General's letter, Sep. 27, 2011*].

14 *Id.*, at 2–3.

satisfactory to 'translate' the behavior amounting to a war crime into an existing offense in the domestic legislation, provided that it reflects the severity of the violation under international law.[15] Thus, even though the majority of the countries surveyed have adopted domestic criminal legislation that incorporates international criminal law, according to their actual practice, and similarly to Israel's practice, the prosecuting authorities base their indictments on the sections of the 'regular' penal code (such as murder, aggravated assault, etc.) and not on sections of the 'special' laws that implement international law.[16]

Therefore, on the matter of legislating war crimes, the Commission recommends:

Filling Gaps in Israeli Legislation

10. The Ministry of Justice should initiate legislation wherever there is a deficiency regarding international prohibitions that do not have a 'regular' equivalent in the Israeli Penal Law, and rectify that deficiency through Israeli criminal legislation.[17] Thus, for example, the Ministry should ensure that there is legislation to transpose clearly into law and practice the absolute prohibition in international law of torture and inhuman and degrading treatment. This is in order to enable 'effective penal sanction' for those committing war crimes, as required by international law.

11. Furthermore, the Commission sees importance in the explicit

15 See *supra*, at para. 5.

16 It is possible that this practice is motivated by the desire of the prosecution to bring about convictions which would be more difficult to achieve if the accused was charged with 'special' articles of the law drawn from international law. See: Chapter B, para. 15, *fn* 53, also see: Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, 7(4) JICJ 723, 732 (2009). It should be noted that in the UK, one prosecution has been brought against a member of the armed forces on a charge of 'inhuman treatment' under domestic legislation incorporating offenses set out in the *Rome Statute*. (see: chapter B, para. 16). In Germany the practice is slightly different. Any violation of the law of armed conflict will be prosecuted under the VStGB. Only such offences which are committed without any relation or connection to an armed conflict can be assessed under the general criminal law.

17 See: *Attorney–General's letter, Sep. 27, 2011*, *supra* note 13, at 3. The letter indicates that there is not a full commensuration between the norms of Israeli criminal law and those of international law.

adoption of the international norms relating to war crimes into Israeli domestic legislation. This is because such legislation goes beyond the *practical* needs (i.e., to charge and punish violators of international humanitarian law), and also serves a *normative* purpose (i.e., to promote deterrence and education).[18] As noted, from the trend reflected in the survey of the six countries it appears that the accepted approach is to incorporate the international criminal offenses into domestic legislation.

12. It should be noted that the Commission's focus in this Report is on violations of international humanitarian law. However, the provisions of the Israeli Penal Law often extend to a broader array of acts. The Commission wishes to emphasize the obvious, that the examination and investigation authorities in Israel must assess whether acts of security forces establish criminal responsibility even if they do not amount to a war crime.[19]

Recommendation No. 2: Responsibility of Military Commanders and Civilian Superiors

13. As noted in Chapter A, international humanitarian law places a particular responsibility on military commanders and civilian superiors for violations that were committed by their subordinates. The responsibility of commanders and superiors includes the obligation to exercise their authority by taking steps to prevent violations, and to take appropriate operational, disciplinary or criminal measures against the violators.[20]

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18 For further reading, see: Knut Dörmann & Robin Geiß, *The Implementation of Grave Breaches into Domestic Legal Orders*, 7(4) JICJ 703 (2009).

19 An example of a domestic offense that entails criminal responsibility is negligent killing. On this matter see: THE SAMPLE EXAMINATION, at para. 23 of the Introduction: In file 377/10 it appears that the question of negligence was not examined (i.e., if the shooter was aware of the nature of his actions, the circumstances or the harmful outcomes of his behavior) even though the operational debrief revealed that the death was caused by serious professional misconduct. For an example of an incident where the question of negligence was examined see: letter from Brigadier–General Dan Efroni, The MAG, to Hoshea Gottlieb, the Commission's Coordinator, *Opinion Regarding Assault of the A–Samouni Family's House*, as well as the opinion attached to it (May 6, 2012) [hereinafter: *the A–Samouni Opinion*].

20 See: Chapter A, paras. 26, 35.

14. Chapter B indicated that the United States is the only country out of the six surveyed that does not have an explicit provision in domestic criminal legislation imposing responsibility on commanders and superiors to exercise authority to prevent violations that were committed or planned by their subordinates.[21] By comparison, in Canada there is a separate indictable offense for commanders and civilian superiors rather than making them liable for a subordinate's offense. That offense applies when commanders know or should have known that their subordinates are committing or are about to commit relevant offenses.[22] In Australia, the relevant provisions in the domestic criminal legislation allow for commanders and civilian superiors to be held liable for the failure to prevent or to punish the offenses of their subordinates.[23] Also in the UK there are offenses that establish the liability of commanders and superiors, including as an accessory to the offense of their subordinates.[24] In the Netherlands, there are offenses that establish the liability of commanders and superiors.[25] In Germany, the punishment for a commander or a superior who fails to prevent an offense by subordinates is identical to that of the actual perpetrator.[26]

15. As detailed in Chapter C, Israeli criminal law does not explicitly address the responsibility of commanders and superiors and their

21 In the United States, unlike the other countries surveyed, there no is reference to command responsibility in federal or state legislation. There is a debate amongst jurists on the possibility of prosecuting commanders for offenses committed by their subordinates, and there are various rulings on the matter by US courts (see Annex C: *The US Report*, at paras. 21–27). In US military manuals there is reference to command responsibility, see for example: DEP'T OF THE ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE, para. 501 (1956): 'In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof'.

22 See: Chapter B, para. 11.

23 *Id.*; See also Annex C: *The Australian Report*, at para. 33.

24 See: Chapter B, *Id.*; See also Annex C: *The UK Report*, at para. 1.46.

25 See: Chapter B, *Id.*; See also Annex C: *The Netherlands Report*, at para. 28.

26 See: Chapter B, *Id.*; See also Annex C: *The German Report*, at para. 119.

obligation to prevent offenses. IDF commanders are required 'to strictly maintain discipline and compliance with the law and the orders', and to take disciplinary action against any offender.[27] According to the Military Advocate–General (hereinafter: the MAG), 'it is the obligation of each commander to prevent and suppress violations of the laws of war by his subordinates, insofar as these are incorporated in military orders'.[28] The question of the criminal liability imposed on commanders for the failure to prevent offenses of their subordinates was dealt with in rulings of the courts martial.[29] In one case, a commander was convicted when he was in the field with his subordinates as aiding the offense, because he did not prevent it, and a separate charge was brought for unbecoming conduct.[30] However, it should be noted, that in most of the cases where IDF commanders were indicted for an offense of their subordinate, the commanders were charged with the crime that was committed, and not with the responsibility for the failure to prevent or the failure to report the offense to the appropriate authorities.[31]

Therefore, on the matter of responsibility of commanders and civilian superiors, the Commission recommends:

A. Filling Gaps in Israeli Legislation

16. The responsibility of commanders and superiors is one of the most significant obligations codified in international humanitarian law and international criminal law. Five out of the six countries surveyed have incorporated command responsibility into primary legislation, and they

27 See: Chapter C, para. 7.

28 *The Public Commission Public Commission for Examining the Maritime Incident of May 31, 2010 – Supplementary Material* 23 (position paper of the MAG Corps, Aug. 9, 2011) [hereinafter: *MAG Position Paper 2011 – Supplementary Material*].

29 *Id.*

30 See: A/78/88 *First Sergeant Danino v. Chief Military Prosecutor*, CM 227, 239 (1988).

31 See for example: HCJ 7195/08 *Abu Rahme v. Brigadier–General Avichai Mandelblit, Military Advocate–General* (unpublished, Jul. 1, 2009); THE SAMPLE EXAMINATION: File 38/09 which dealt with an incident where the force commander was indicted.

were not satisfied with merely incorporating the obligation into the rules and procedures of their armed forces.

The Commission recommends enacting provisions that impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, where the former did not take all reasonable measures to prevent the commission of offenses or did not act to bring the matter to the compotent authorities when they became aware of the offenses *ex post facto*.

B. Investigation of Commanders

17. Orders by commanders may in themselves (as distinct from omissions by commanders) also constitute violations of international humanitarian law. The Commission emphasizes that such orders by commanders should also be subject to examinations and investigations.

B. THE GROUNDS FOR CARRYING OUT THE OBLIGATION TO EXAMINE AND INVESTIGATE ('WHEN TO INVESTIGATE?')

18. In this section of the chapter, we will examine the processes that lead to opening an examination or investigation in Israel. Prior to assessing the grounds that establish this duty and whether they conform to international law, we will examine the procedures that obligate soldiers to report suspected violations, including the requirement to document the scene of an incident. Reporting duties are essential because they form the basis for establishing grounds for an examination and investigation.

Recommendation No. 3: Reporting Duties

19. As detailed in Chapter A, military commanders have a general obligation to prevent and report violations of international humanitarian law and to ensure that appropriate measures are taken in response to suspected violations.[32]

20. The reporting duties play a significant role in the examination and investigation mechanisms of the countries that were surveyed in Chapter B.

In the United States the armed forces are required to report to the chain of command any 'reportable incident'. A reportable incident is a suspected violation of international humanitarian law that does not amount to a war crime.[33] In addition, there is a special requirement to report Category 1 serious incidents, i.e., suspected war crimes. Category 1 serious incidents require reporting both to military commanders and also to military legal advisors. As part of the reporting duties commanders

32 See: Chapter A, para. 26.

33 See: Dep't of Defense Directive 2311.01E, *DoD Law of War Program*, para. 5.11 *et seq*, (May 9, 2006); Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program*, paras. 6.f.(4)(e)(1)–(3) (Apr. 30, 2010).

are instructed to take steps to preserve potential evidence pending their transfer to appropriate authorities.[34]

In Canada, the officers and non–commissioned members must report to the 'proper authority' on every violation of relevant statutes, regulations, rules, orders and instructions.[35] Moreover, according to the designated reporting procedures for specific operations, any and all 'significant incidents' must be reported immediately. This covers an incident that may undermine the public values or lead to the discredit of Canada at home or abroad.[36]

In Australia, the armed forces must report all 'notifiable incidents' to different authorities depending on the nature of the incident.[37] Notifiable incidents include any incident that raises a reasonable suspicion of an offense against the Australian military disciplinary rules or penal code. It also covers incidents involving civilian death, serious injury or disappearance even where there may be no reasonable suspicion of an offense. The report must include information about the time, the location and the circumstances of the incident, and details about the individuals involved. As part of the reporting duties, the commanders have the responsibility, following consultation with the military police, to take any possible steps in order to gather and protect potential evidence and to prevent injury to potential witnesses or their testimony.[38]

In the UK, commanders must report 'Schedule 2 offences' to the service police. Schedule 2 offences include general criminal law offenses

34 See: Chapter B, para. 32; See also Annex C: *The US Report*, at para. 102.

35 See: Chapter B, para. 42; See also Annex C: *The Canadian Report*, at para. 108.

36 Id., *The Canadian Report*, at para. 117, referring to, for example: Joint Task Force Afghanistan Theatre Standing Order 304 (Significant incident Reporting).

37 See: Defence Instructions (General), DI(G) ADMIN 45–2: The reporting and management of notifiable incidents (Mar. 26, 2010).

38 See: Chapter B, para. 49; See also Annex C: *The Australian Report*, at para. 48.

such as murder and manslaughter as well as allegations of war crimes.[39]

In the Netherlands, all members of the armed forces are required to report any suspected violation of the laws of armed conflict to the responsible authorities.[40] Furthermore, it is the field commander's obligation to report to the public prosecution service any incident in which there was a use of force.[41]

In Germany, there are no distinct reporting obligations aside from the general obligations to report suspected criminal offenses to civilian prosecutorial authorities.[42]

21. As detailed in Chapter C, the obligation in the IDF to report suspected offenses is codified in the Military Justice Law: 'a commander who knows or has reasonable grounds to believe that one of his subordinates has committed an offense', must prepare a complaint and bring it before a competent officer.[43] In 2005, the Chief of Staff adopted a Reporting Procedure for Incidents in which Palestinian Civilians were Injured to deal with the reporting of 'any incident involving IDF soldiers where a person who was not involved in life threatening combat was killed or injured' or 'in any case of doubt concerning the involvement of a person in the aforesaid type of combat' (hereinafter: the Reporting Procedure).[44] According to the procedure, such incidents must be immediatly reported 'to the office of the Chief of Staff, the Operations Branch and the MAG. *The said report will be submitted no later than 48 hours from the time of the incident*'. The Reporting Procedure sets out guidelines for how to fill

39 See: Chapter B, para. 56.

40 See: Chapter B, para. 67; See also Annex C: *The Netherlands Report*, at paras. 70–72.

41 See Annex C: *The Netherlands Report*, at para. 50.

42 See: Chapter B, para. 61.

43 See: Chapter C, para. 72; See, also: Article 225 of the Military Justice Law, 5715–1955, LA 189 [hereinafter: the Military Justice Law].

44 IDF Operational Branch instructions Op–B–015, *Reporting Procedure for Incidents in which Palestinian Civilians were Injured* [hereinafter: The Reporting Procedure].

out a Preliminary Report Form. The commanders that are enumerated in the Procedure are responsible for submitting the 'Preliminary Report of an Incident involving the Death or Injury of a Palestinian Civilian' form (hereinafter: the Preliminary Report Form) to the MAG within 48 hours. The Preliminary Report Form must indicate the location of the incident, the time of the incident, details of the soldiers involved, the number of casualties including their condition, gender, age and other details. According to the Reporting Procedure, 'copies of the relevant Operation Log Books, the daily reports and any other relevant material must be attached to the Preliminary Report Form'. The Reporting Procedure further requires that 'it is the responsibility of the regional brigade commander and the unit commander... to ensure photographing and documenting of the scene immediately after the incident provided it does not endanger the forces and it is possible under the circumstances', and 'insofar as there are grounds that prevent photographing and documenting... the reasons must be detailed'.

From the material submitted to the Commission, it appears that the commanders do not fill out Preliminary Report Forms following incidents as required by the Reporting Procedure,[45] and that the relevant scenes are not documented.[46] In the MAG's testimony and submissions, it was argued that although the Reporting Procedure is not literally complied with, he usually learns about these incidents in a relatively short period of time, even quicker than the procedure requires. Notwithstanding, there were instances in which the MAG learned of relevant incidents only after

45 See also: Chapter C, para. 73. The Commission also asked to receive that forms that were completed by the units and prepared according to the Reporting Procedure, but it was told that no such forms exist.

46 See, for example, THE SAMPLE EXAMINATION: File 34/09 included materials which indicated that the scene was not documented; in the case of Jihad al Sha'ar's killing where a Palestinian was killed when assaulting a soldier with a knife, there was no documentation of the knife (the case was not examined by the Commission and it arose during the examination of file 359/07). Following this case, an instruction was issued that 'a command clarifying instructions would be issued' about the documentation of the scene and of the assault weapons. See also: Meeting between Hoshea Gottlieb, the Commission's Coordinator, and Major–General Avichai Mandelblit, The Military Advocate–General 1 (Aug. 10, 2011) [hereinafter: *Meeting with MAG*]. See also: Chapter E, paras. 32–36.

a long period of time, and only through complaints by injured parties or their representatives.[47] These delays even occurred when, at the time of the incident, the IDF units involved in the operation already knew the outcome.[48]

Therefore, on the matter of reporting duties, the Commission recommends:

A. Assimilating Reporting Procedures

22. Reporting duties are enshrined in international law and regulated in five of the countries surveyed as well as in Israel. The obligation to report an incident leads to examination and investigation procedures, and is therefore essential in fulfilling the obligation to investigate. Consequently, a failure to comply with these obligations hinders the ability to initiate any necessary examination or investigation.

23. The Commission concludes that *in practice* the Chief of Staff's Reporting Procedure is not implemented. In order to ensure its implementation the Reporting Procedure should be incorporated into the Supreme Command Orders. Moreover, it should be assimilated by all IDF units and sanctions should be imposed on commanders who do not comply with the Procedure.

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47 See: Transcript – Part B, session no. 2 "Testimony of the Military Advocate–General" 17 (Apr. 11, 2011) [hereinafter: *MAG's Testimony – Part B*]; *Meeting with MAG*, *supra* note 46, at 2; See also: Chapter C, para. 73, citing the MAG: 'As to the reporting from military authorities there are cases in which the information is not submitted in time either because of lack of awareness or failure to observe the procedure, or because in certain cases military authorities are unaware that an operation caused the injury of an individual'.

48 See: THE SAMPLE EXAMINATION: File 377/10 was opened in December 2010 into the incident in which a man was killed during an activity in July 2010. The file was opened following a letter from B'Tselem even though the death was determined by a military doctor immediately after the incident and an operational debrief was commenced; File 359/07 was opened one month after the incident in question (following a letter from B'Tselem) even though it appears that the unit involved was required to report the incident to the MAG immediately.

The Commission's view is that the *substance* of the Reporting Procedure established by the Chief of Staff complies with Israel's international legal obligations. The Commission, nonetheless, recommends broadening the scope of the Procedure beyond incidents during which an uninvolved person was killed or injured, so that it should apply to *every* incident involving the IDF or forces for which the IDF is responsible, that raise questions as to whether a violation of international humanitarian law has occurred.

B. Documentation of the Scene

24. Documentation of an incident scene is part of the reporting duties and it contributes to a subsequent examination and investigation.[49] In Israel, as in the United States and Australia, the Reporting Procedure obligates documenting the scene immediately following an incident.[50] The Commission therefore emphasizes this obligation, which includes the seizing of each exhibit and all documents that may assist the examination and investigation, and also storing the exhibits (such as clothing, ammunition, or weapons seized) in conditions that will best preserve them for proper examination at a later date.

Recommendation No. 4: Grounds Giving Rise to an Obligation to Examine and Investigate

25. As detailed in Chapter A, international humanitarian law establishes the obligation to investigate when there is a credible accusation or a reasonable suspicion of the commission of a war crime. The existence of a reasonable suspicion that a war crime has been committed is dependent both on the facts of the incident, and the legal context. Therefore, when the information is partial or circumstantial and it does not establish a reasonable suspicion that requires an investigation, a fact–finding

49 See: Chapter A, paras. 82, 101–102.

50 See for example Annex C: *The US Report*, at para. 92.

assessment must be held in order to clarify whether there is a need to investigate.[51]

26. The survey of the countries in Chapter B suggested that two of the countries implemented a 'fact–finding assessment' mechanism. In the United States, commanders have an obligation to conduct a Preliminary Inquiry when there is information about a soldier who was involved in what amounts to a reportable incident, or when a soldier is responsible for such an incident, or when the circumstances require it by law.[52] In Australia, an assessment is conducted, at the discretion of the commander, after he becomes aware of a significant incident or of an allegation that such an incident occurred. This assessment is known as a Quick Assessment (QA). The information gathered in the QA will assist in the decision about whether or not to open an investigation.[53]

27. As detailed in Chapter C, according to the current investigation policy in the IDF, an investigation by the Military Police Criminal Investigation Division (hereinafter: CID) is opened immediately when complaints raise a *prima facie* suspicion of criminality (e.g. looting). Moreover, the CID will usually investigate operations in Judea and Samaria (hereinafter: the West Bank) that result in the death of a person except when the incident involves 'actual combat'. In these cases, the decision to open an investigation is delayed until the operational debrief is transferred to the MAG who then examines whether the circumstances of the incident justify the initiation of an investigation.[54] This is an existing policy that was developed without explicit basis in Israeli law. The only basis is a CID commander's discretion provided by an Order of General Staff which allows him, upon consultation

51 See: Chapter A, paras. 46, 49, 59.

52 See: Chapter B, para. 32; See also Annex C: *The US Report*, at paras. 64, 105.

53 See: Chapter B, para. 50; See also Annex C: *The Australian Report*, at para. 49; Likewise, according to the policy currently practiced in Australia, a full administrative inquiry is launched in any case of a soldier's death; significant damage to property; or the death of an uninvolved civilian (see on this matter Annex C: *The Australian Report*, at para. 50).

54 See: Chapter C, paras. 67–71.

with a member of the MAG Corps, to refrain from opening an investigation when 'in his opinion there is no objective justification for doing so'.[55]

Therefore, on the matter of the grounds for opening an examination and an investigation, the Commission recommends:

The Investigation Policy in the IDF

28. The Commission concludes that on the whole the Investigation Policy in the IDF is consistent with Israel's international legal obligations (see Recommendation No. 5 for the issue of delaying the decision to begin an investigation until the operational debrief is received). However, the authority to determine such a policy should be defined explicitly in the appropriate rules. The Commission further recommends that upon receiving the Preliminary Report Form, the MAG Corps should immidiatly classify the legal context of the incident, i.e., whether is it an incident involving 'actual combat', and therefore subject to the rules regulating the conduct of hostilities, or any other incident subject to law enforcement norms. This will aid in directing, as quickly as possible, the assesment of a complaint to the correct channel.

55 *Id.*, at paras. 67, 69.

C. Method of Conducting the Examination and Investigation ('How to Investigate?')

29. According to the Investigation Policy described above, in certain cases a CID investigation is opened, and in other cases the decision to initiate an investigation is delayed pending the outcome of the operational debrief, based on which it will be determined if there is a suspicion of criminality. This section on 'how to investigate?' will therefore be divided into two. Firstly, we will assess whether the way in which the IDF conducts an operational debrief renders the debrief useful for a fact–finding assessment; and how a decision is reached to open an investigation. Secondly, we will discuss the manner in which investigations are conducted into complaints and claims against the IDF, the ISA, the police, prison wardens and senior decision–makers.

IDF Proceedings Prior to an Investigation

Recommendation No. 5: Fact–Finding Assessment

30. As noted in Chapter A, the purpose of a fact–finding assessment is to collect information in order to provide data on which it is possible to decide whether to open an investigation. If a reasonable suspicion of the commission of a war crime is revealed, a decision will be made to open an investigation. The fact–finding assessment must be conducted professionally, with proper expertise, and promptly so that it facilitates a potential investigation and does not hinder it.[56]

31. As described in Chapter B and as noted in paragraph 26 above, the equivalent to a 'fact–finding assessment' is practiced in some of the countries surveyed. For example, in the United States, although there is

56 See: Chapter A, paras. 49, 109–112.

no detailed guidance on the conduct of a Preliminary Inquiry, it is usually carried out by the commander himself or by a member of the command. The Manual for Courts Martial provides that the Preliminary Inquiry for a suspected offense should gather all reasonably available evidence bearing on guilt or innocence.[57] In Australia, a QA comprises of only a brief statement of the facts. The officer undertaking the QA would usually speak to the personnel involved in the incident to understand what occurred, and in what context. The individual conducting the QA must have no involvement or personal interest in the matter.[58] The QA is submitted within 24 hours to the Commander Joint Operations (CJOPS) in order for him to decide whether to continue an administrative inquiry or to initiate a criminal investigation.[59]

It is important to note that in all of the countries surveyed, operational debriefs are conducted after military operations. In the US these are called 'after action reviews' and in the Netherlands they are called 'after action reports'.[60]

32. As detailed in Chapter C, and in paragraph 27 above, in Israel when complaints or claims of international humanitarian law violations are filed as a consequence of an incident involving 'actual combat', the decision to commence an investigation is delayed until an operational debrief is received. This allows the MAG to consider whether the circumstances of the incident justify the opening of an investigation.[61] Thus, the operational

57 See: Chapter B, para. 36; See also Annex C: *The US Report*, at para. 64.

58 See: Defence Instructions (General), DI(G) ADMIN 67–2–10: Directing a Quick Assessment Officer (Aug. 7, 2007): '*QAOs must be free, to the maximum extent feasible, from any suggestion of bias or conflict of interest* involving any issue or witness surrounding the occurrence. A member of a unit or workplace in the direct chain of command or line management of the commander/supervisor instigating the QA may be selected as a QAO provided that they have no involvement or personal interest in the matters or people involved in the QA, which is likely to compromise their objectivity or impartiality'.

59 See: Chapter B, paras. 49–50; See also Annex C: *The Australian Report*, at para. 49.

60 See also: Chapter B, paras. 34, 67.

61 See: Chapter C, paras. 67–71, 92–93; The Commission has learned of the operational debrief procedures from the testimonies and materials submitted to it and particularly from an in depth examination of the operational debriefs as part of the THE SAMPLE EXAMINATION as well as from a

debrief is used as an assisting tool in the conduct of a fact–finding assessment. According to the guidelines on conducting an operational debrief, outlined in Chapter C, the commander that conducts the debriefing must gather and verify facts, identify the findings that bear relevance on the activity in question, and draw conclusions.[62] The guidelines emphasize the importance of conducting the operational debrief as close as possible to the time of the incident in question. In order to ensure the credibility of the data gathered in the framework of the debriefing, the individual conducting it is not subject to the rules of evidence and is authorized to record the testimony of any soldier and to collect all relevant documents. It is the duty of every soldier participating in the debriefing to cooperate and provide any relevant information. Supplying false details or withholding important information during an operational debrief are considered offenses punishable by imprisonment.[63]

Besides the operational debrief which is conducted within the framework of the IDF unit being investigated, there is also an 'experts debrief', which is conducted in cases of complicated incidents at the discretion of the commanding ranks.[64] An experts debrief is conducted by individuals possessing the appropriate expertise in the matter, who are not part of the chain of command and were not involved in the incident in question.

33. Academics and representatives of the human rights organizations, who testified before the Commission, raised reservations about the MAG's reliance on the operational debriefs as a basis for subsequent decisions on opening an investigation.[65] Thus, it was contended before the Commission

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meeting between Hoshea Gottlieb, the Commission's Coordinator, and Colonel Erez Katz (Nov. 11, 2011) who headed one of the experts debriefs established following Operation Cast Lead [hereinafter: *Meeting – Colonel Katz*].

62 See: Chapter C, para. 88.

63 *Id.*

64 *Id.*, at para. 91.

65 See: *Benvenisti testimony*, *supra* note 11, at 15, where he claimed that: 'international law has not

that: (1) the operational debrief is tainted by an inherent conflict of interest because it is conducted by the same forces whose activity is under scrutiny;[66] (2) the debriefing might hinder a future investigation, because it has the potential of causing a 'coordination of testimonies' by the soldiers who were debriefed;[67] (3) the operational debrief is not limited in time and therefore might unreasonably delay the investigation;[68] (4) the operational debrief is generally based on soldiers' accounts without collecting evidence from complainants or from other witnesses;[69] (5) the commanders, who conduct the debriefings, lack professional training for performing investigations, and often these take place in a superficial and non–exhaustive fashion;[70] (6) there is no right of appeal on the conclusions of the debriefing.[71]

On the other hand, the MAG argued that in his decision about whether to initiate an investigation he treats the findings of the operational debrief as only one of the factors to be considered and these findings are compared with additional information that is available. Therefore, the findings of the debriefing should be viewed as merely a 'supporting tool' for his decision.[72] Additionally, the MAG may instruct that the debriefing be clarified or supplemented to provide further information or clarify its findings, in order to reconsider the issue. On this matter the MAG emphasized that the *main role* of the debriefing is 'operational': i.e., it is an organizational tool in order to 'improve the performance of military units' and in order to learn

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reached such a resolution that it can tell us exactly what method of investigation is preferable to the other methods. I think that the overall guiding test is the proportionality test... in other words, if the operational debrief is really essential for the army and hinders... the potential criminal process, it is necessary... to find the proper balance, in a proportionate manner'.

66 See: *Is the Customary Mechanism for Investigation Violations of the Laws of War Suitable for Israel's Obligations* 20–21 (position paper by the Association of Civil Rights in Israel, Mar. 28, 2011) [hereinafter*: ACRI – Position Paper*].

67 See: *Shany, Cohen & Rosenzweig, Response Paper to MAG*, *supra* note 11, at 13.

68 *Id.*, at 14; See also: *The Duty to Investigate: Compatibility of Israel's Duties under International Law with the Examination and Investigation of Complaints Regarding Violations of the Law of Armed Conflict* 34 (position paper by 'Yesh Din' – Volunteer for Human Rights Organization, Mar. 23, 2011) [hereinafter: *Yesh Din – Position Paper*].

69 *Yesh Din – Position Paper*, *supra* note 68, at 32.

70 See: *ACRI – Position Paper*, *supra* note 66, at 21.

71 See: *Yesh Din – Position Paper*, *supra* note 68, at 34.

72 See: *Position Paper of the MAG Corps* (Dec. 19, 2010) 69–70 [hereinafter: *MAG Position Paper 2010*].

lessons. In other words, the MAG's use of the debriefing, for assessing whether the circumstances of the incident justify opening an investigation, is only secondary.[73] The MAG stated that: 'the debriefing is not a tool of the MAG it is a tool of the commander'.[74]

Therefore, on the matter of conducting a fact–finding assessment, the Commission recommends:

A. Fact–Finding Assessment

34. It appears that the MAG uses the operational debrief for the purpose of fulfilling his obligation to conduct a fact–finding assessment. The Commission discerned a number of difficulties in using the operational debrief for assessing the existence of a reasonable suspicion of a 'serious violation' of international humanitarian law. Thus for example, the use of an operational debrief may unreasonably delay the decision on initiating an investigation.[75] Likewise, the operational debrief is not focused on questions of criminality.[76]

35. The Commission's view is that the operational debrief should primarily serve the *operational* needs of the military. Therefore, the Commission recommends that a *separate* mechanism shall be established in order to conduct a fact–finding assessment, similar to the Australian model, which will enable conducting an assessment that complies with the international legal requirements, as detailed in Chapter A, i.e., a prompt

73 *Id.*, at 15, 69; See also: *Meeting with MAG*, *supra* note 46.

74 *MAG's Testimony – Part B*, *supra* note 47, at 29.

75 See: Chapter C, para. 90, *fn* 271; THE SAMPLE EXAMINATION: File 203/10 reveals that the MAG Corps received the debrief six months after the date of the incident; File 279/07 reveals that the MAG Corps received the debrief approximately ten months after the incident; File 427/07 reveals that the MAG Corps requested to receive the debrief five months after the incident (unclear when the debrief was submitted); File 375/09 reveals that the MAG Corps located the debrief two years after the incident; In addition, as part of file 359/07 the Commission came across a summary of a meeting between the MAG and a certain General, during which the MAG raised the difficulty of receiving debriefs.

76 See: THE SAMPLE EXAMINATION: File 375/09. See also: Chapter E, para. 39

and professional assessment, which facilitates a potential investigation and does not hinder it.[77]

The Commission recommends that immediately upon receiving the Preliminary Report Form and its annexed materials, as required by the Reporting Procedure, the MAG or whomever he delegates to do so, shall decide on one of the following possibilities:

a. That there is reasonable suspicion of criminal activity and that an investigation should be opened immediately.

b. That there is no reasonable suspicion of criminal activity and that the case is closed.

c. That additional information is required in order to determine whether there is reasonable suspicion of criminal activity.

If the MAG decides that more information is required, he shall order a special team, established for this purpose, to examine the circumstances of the incident (hereinafter: the fact–finding assessment team). The members of the team shall be comprised of experts in the theatre of military operations, international law, and investigations. The function of the team will be to provide the MAG with as much information as possible, within a timeframe that is stipulated in procedures, in order to enable the MAG to make a decision about whether to open an investigation.

This recommendation does not prevent the MAG from reading the operational debrief (subject to Recommendation No. 6(A)).

77 It should be noted that such a separate mechanism responds to the conflict of interest criticism outlined above in para. 33.

B. Limited Investigation within the Fact–Finding Assessment

36. During the review of the files it surveyed, the Commission learned of a practice known as a 'limited investigation'. According to this practice, the MAG occasionally requests additional information in order to receive a more complete factual picture than that provided by the operational debrief. Such information is acquired by collecting testimonies of complainants and additional witnesses alongside the operational debrief.[78] The Commission endorses this practice and recommends that a limited investigation should be conducted, where necessary, within the framework of the fact–finding assessment.[79]

Recommendation No. 6: The Decision on Whether to Open an Investigation

37. As stated in Chapter A, one of the principles required for an 'effective investigation' is promptness. In addition to creating an obligation in and of itself, the principle of promptness strengthens the principle of effectiveness and thoroughness. The principle of promptness dictates that an investigation must commence as soon as possible and that it should proceed without unreasonable delays. Therefore, *the decision on whether to open an investigation* must satisfy this requirement.

38. There is no defined timeframe for the MAG's decision to open an investigation.[80] Furthermore, from the material surveyed by the Commission,

78 See: *Meeting – Colonel Katz, supra* note 61, where it was learned that, in the context of one of the experts debriefs following Operation Cast Lead, contact was made with residents from Gaza who were involved in the incident; See also: THE SAMPLE EXAMINATION: File 492/09 were the MAG ordered that a *limited investigation* should be opened, and within the framework of this investigation testimonies of the witnesses mentioned in the complaints, and any material or evidence in their possession should be collected; see also file 229/09.

79 It should be noted that this practice also responds to the criticism relating to the failure to collect evidence from complainants or from other witnesses outlined above in para. 33.

80 On this matter, see: HCJ 9594/03 *B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories v. Military Advocate–General* (still unpublished, Aug. 21, 2011), at para. 14 of President Beinisch's judgment: 'The MAG should make his decision with reasonable and appropriate promptness based on the material transferred to him, and he must refer to the need to make a decision quickly in order to avoid reaching a nullification of the ability to conduct an effective criminal

it is evident that, occasionally, the decision to begin an investigation lingers for a long time.[81] One of the factors that may contribute to this is the MAG's obligation to consult. As stated in Chapter C, when the debrief's material reveals a suspicion that an offense has been committed, and prior to the MAG ordering that an investigation be opened, he must consult with the commanding officer responsible for the unit involved in the incident (of the minimum rank Major–General). The purpose of this consultation is to ensure the relevant operational circumstances are brought to the attention of the MAG. The MAG, nontheless, retains his discretion regarding the decision to open an investigation.[82]

Therefore, on the matter of the decision to open an investigation, the Commission recommends:

A. Timeframe

39. The Commission recommends the establishment in procedures of a timeframe of a few weeks during which the MAG shall decide whether to open an investigation based on the material in his possession. As noted, the Preliminary Report Form is submitted to the MAG no longer than 48 hours after the incident. In cases where the Preliminary Report Form does not provide adequate factual information for making a decision about opening an investigation, the MAG shall instruct the fact–finding assessment team to examine the circumstances of the incident within a shorter period of time than the timeframe set for his decision to initiate an investigation (See Recommendation No. 5(A)).

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investigation with the passage of time. However, the professional judgment obligates an in–depth investigation, and a formal time limit might damage the level of the decision'.

81 Thus for example *The A–Samouni Opinion*, *supra* note 19, is concerned with the investigation of an incident that lead to the death of 21 members of one family on Jan. 5, 2009. From the Opinion it appeared that the decision to open the investigation was made on Jul. 6, 2010; See also: THE SAMPLE EXAMINATION: File 359/07 where the decision on opening an investigation was made approximately eight months after the event in question. For additional examples see: *Yesh Din – Position Paper*, *supra* note 68, at 34; *ACRI – Position Paper*, *supra* note 66, at 22.

82 See: Chapter C, para. 93.

40. In addition, the MAG should not be *obliged* to consult with the Major–General responsible for the unit involved in the incident, but rather he shall be *allowed* to consult with *any* commander as he sees fit. The Commission came to the conclusion that the MAG's duty to consult contributes to understanding the operational aspects of an incident; however, it can cause delays in reaching a decision. The MAG must consider, therefore, whether the benefits of consulting with a commander outweigh the disadvantages, and make his decision accordingly.

B. Duty to Provide Reasoning

41. According to Israeli law, the MAG, who is an administrative authority, must provide reasoning for his decisions.[83] As described in Chapter C, the MAG examines the operational debriefs in a designated 'debrief meeting', and decides whether to open investigations into the many cases reviewed during this meeting. From the files surveyed by the Commission, it appears that the reasoning behind these decisions is not always given.[84]

The Commission recommends that every decision of the MAG not to open an investigation shall state the reasoning for that decision. This is important from a public and legal perspective, as well as a practical perspective, because such reasoning enables appeal and review of the MAG's decision.

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83 See: HCJ 142/70 *Shapira v. Regional Committee of the Bar Association*, 25(1) 325 (1971); HCJ 4733/94 *Naot v. Haifa City Council*, 49(5) 111 (1996), at paras. 12–14 of Justice Matza's judgment; HCJ 7177/95 *Eurogum Ltd. v. Investments Center*, 50(2) 1 (1996), at paras. 1–3, 5–7 of Justice Zamir's judgment; HCJ 2159/97 *Hof Ashqelon Regional Council v. Minister of the Interior*, 52(1) 76 (1998), at para. 18 of Justice Zamir's judgment.

84 See for example: THE SAMPLE EXAMINATION: File 203/10 included a summary of a debrief meeting that dealt with 16 files. In 14 of the files it was decided that 'there is no room to instruct that a CID investigation be opened' without stating the reasoning for the decision; File 375/09 included a summary of a debrief meeting that dealt with 40 files without stating the reasoning for the decisions not to open an investigation. It should be noted, however, that the reason for not stating the reasoning within the MAG's decisions may be due to his reliance on the legal opinions of the MAG Corps for Operational Matters which themselves provide reasoning. Notwithstanding, in file 359/07 the MAG's decision not to open an investigation did not contain a written reason even though it was contrary to the legal opinion of the MAG Corps for Operational Matters.

C. Submitting Material to the Commanding Ranks

42. Sometimes, command sanctions must be considered in order to draw operational conclusions and ensure compliance with international humanitarian law.[85] Therefore, in such cases, after an examination process or a CID investigation (irrespective of the outcome) the MAG shall refer the relevant material to the commanding ranks.[86]

Conducting the Investigation

43. In the framework of assessing the manner of conducting an investigation ('how to investigate?') we will also examine the Israeli investigative bodies ('who investigates?'). As detailed in Chapter A, an investigation must comply with the international legal principles of independence, impartiality, effectiveness and thoroughness, promptness, as well as transparency. An investigation that conforms with these principles is considered an 'effective investigation'.

The Investigative Bodies

44. In this subsection, the Commission will examine whether the bodies in Israel that investigate violations of international humanitarian law are competent to conduct an 'effective investigation' as defined by international law. As evident from Chapter A, international law, generally, does not determine the appropriate investigative bodies, but rather determines principles which the appropriate bodies must fulfill. However, conclusions can be inferred from these principles as to the investigative bodies.

85 See: Chapter A, paras. 23, 26, 61.

86 An example for such conduct is *The A–Samouni Opinion*, *supra* note 19, at 2, which recommended against taking legal measures following a CID investigation: '*the findings of the investigation and debriefing were presented to the Chief of Staff*, who *decided to take command sanctions against the Givati Brigade Commander*... and instructed that he *not be promoted further in the operational–command route*'.

45. As detailed in Chapter C, there are a number of bodies in Israel that are also responsible for the investigations of complaints and claims of violations of international humanitarian law:

a. The MAG Corps and the CID (that investigate complaints and claims directed at IDF soldiers);[87]

b. The Israel Police (that investigates complaints concerning shooting incidents by Police Officers in the West Bank);[88]

c. The Interrogatee Complaints Comptroller (hereinafter: the Mavtan), the Mavtan's Supervisor, and the Police Internal Investigations Department in the Ministry of Justice (hereinafter: the PIID) (investigating complaints directed at ISA investigators);[89]

d. The National Prison Wardens Investigation Unit (hereinafter: the NPWIU) (that investigate complaints involving violations occurring in the detention facilities, directed at wardens);[90]

e. Commissions of Inquiry (that usually handle the investigation of incidents involving senior decision–makers).[91]

Therefore, the Commission will examine whether the various investigative bodies and the mechanisms these bodies employ are compatible with the international legal principles of an 'effective investigation'. First, the Commission will examine the bodies and mechanisms that investigate complaints against IDF soldiers. Second, the Commission will examine the bodies and mechanisms that investigate complaints against police officers,

87 See: Chapter C, paras. 15–26, 31–38.

88 See: *Id.*, paras. 44, 46.

89 See: *Id.*, paras. 48–49.

90 See: *Id.*, para. 51.

91 See: *Id.*, paras. 55–58.

against ISA investigators, against wardens and against senior decision–makers.

1. The Body that Investigates Complaints against IDF Soldiers

46. In examining whether the mechanisms in the bodies investigating complaints and claims against IDF soldiers are compatible with the principles of an 'effective investigation', we will begin by examining the independence of the MAG and the MAG Corps. Second, we will examine the MAG's 'dual hat' and whether it conforms with the principle of impartiality. Third, we will discuss the effectiveness and thoroughness of the CID investigations. Fourth, we will consider how to conduct a prompt investigation. Fifth, we will assess the transparency of the investigations in the IDF. Following the Commission's assessment of the mechanisms according to the principles of an effective investigation, we will examine the oversight and review mechanisms for the IDF investigative bodies.

Recommendation No. 7: Independence of the MAG

47. As established in Chapter A, the mere existence of a military justice system, does not, in and of itself, contradict the principle of independence enshrined in international law.[92] However, in order to comply with the requirement of independence, an investigation in the military justice system of a reasonable suspicion for a 'serious violation' of international humanitarian law, must be conducted outside the chain of command.

48. As detailed in Chapter B, the four common law countries (which is also, by and large, the legal system in Israel) have a discrete military justice

92 See: Chapter A, para. 73.

system.[93] Furthermore, in all six of the countries surveyed, investigations into the military are carried out by military police. In the last decade, however, there has been a trend in these countries towards involvement of the civilian system in the military justice system.[94]

49. Complaints of violations of international humanitarian law directed at IDF soldiers are investigated by the military justice system headed by the MAG. As noted in Chapter C, while the MAG is subordinate to the Chief of Staff in rank, from a professional perspective he is subordinate to the guidance of the Attorney–General. This is because the Attorney–General stands at the head of the legal system of the executive branch, including the prosecution and law enforcement system.[95] In materials he submitted to the Commission, the MAG clarified that according to military orders, while he is subordinate to the Chief of Staff in rank, and he is a part of the professional staff of the General Staff, 'he is only subject to the authority of the law'.[96] He also emphasized that his independence extends throughout the entire MAG Corps and is not limited to the MAG himself.[97]

The independence of a military justice system is assessed, *inter alia*, according to the procedures for appointing the head of that system: his tenure (including the authority to extend it) as well as the determination of rank.[98] In Israel, the MAG is appointed by the Minister of Defense, on

93 For details, see: Chapter B, para. 2.

94 In Australia it was established by law that the JAG is appointed by the Governor–General for a fixed period. Though he has a two star rank the JAG does not have any command or administrative liability over the officers in professional matters, he is not part of the chain of command and is subordinate to the Minister of Defense and reports directly to him (see: chapter B, para. 25; Annex C: *The Australian Report*, at para. 51). In Canada it was also established by law that while the JAG supplies the chain of command with the legal services it requires, he is subordinate to the Minister of Defense and reports directly to him (and see: chapter B, para. 23; Annex C: *The Canadian Report*, at para. 97). In the UK an independent military prosecuting authority was established by law in 2006, headed by an appointee by the Queen, in coordination with the Minister of Defence, and he may be a civilian, as he currently is. Finally, as of 2011 the head Military Police officers are appointed by the Queen (and see: chapter B, para. 27; Annex C: *The UK Report*, at paras. 3.32–3.33).

95 See: Chapter C, para. 18. See also: HCJ 4723/96 *Atiya v. Attorney–General*, 51(3) 714 (1997), at para. 11 of Justice Beinisch's judgment [hereinafter: *Atiya* case].

96 See: Chapter C, para. 18.

97 *Id.*

98 Thus for example the US congress wished to enhance the independence of the JAGs from their

the recommendation of the Chief of Staff.[99] Thus, the Chief of Staff and the Minister of Defense must be in agreement in order to appoint a MAG. The MAG's tenure is not fixed, and thus, for example, the last MAG served for approximately eight years and his predecessor served for approximately four and a half years. It should be noted that both these MAGs were promoted to the rank of Major–General during their tenure.[100] On this matter the Commission was informed by the Chief of Staff's Office that due to the importance of the MAG's independence, the Chief of Staff and the Minister of Defense agreed to limit the term of office of the current MAG to four years and his promotion in rank, to Major–General, was set in advance.[101]

Therefore, on the matter of the MAG's independence, the Commission recommends:

A. Professional Subordination

50. The Commission's view is that the MAG's professional subordination to the Attorney–General is consistent with the international legal requirement for independence. It is also consistent with the trend of civilian involvement identified in the countries surveyed. However, this professional subordination is not sufficiently institutionalized. This should be remedied by legislation and organizational arrangements. Below, we will outline recommendations on this matter.

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commander – the President of the United States – by revoking the President's ability to promote their ranks during their tenure. See on this issue: The National Defense Authorization Act for Fiscal Year 2008, Sec. 543 (Public Law 110–181, 122 Stat. 3–604) (Jan. 28, 2008).

99 Article 177 of the Military Justice Law.

100 See also: *Meeting with MAG*, *supra* note 46, at 5.

101 See: letter from Colonel Hod Betzer, Assistant to the Chief of Staff, to Hoshea Gottlieb, the Commission's Coordinator, *Status of the Military Advocate–General* (Nov. 10, 2011). It was further stated in the letter that it was decided to 'fix the MAG's position at the rank of Major–General'.

B. The MAG's Appointment

51. The Commission recommends that, in order to strengthen the independence of the MAG, the Minister of Defense, should appoint him on the recommendation of a public–professional committee. This committee shall be composed in a similar manner to the public–professional committee that recommends the appointment of the Israeli Attorney–General.[102] Furthermore, in order to institutionalize the professional subordination of the MAG to the Attorney–General, the latter should be the chair or a member of the public committee.

C. The MAG's Tenure and Rank

52. In order to ensure the independence of the MAG, the Commission recommends that his tenure should be fixed, like that of the Attorney–General, at one term of six years that *may not be extended*.[103] In addition, the MAG shall be given a fixed rank.

Recommendation No. 8: The MAG's 'Dual Hat'

53. As detailed in Chapter A, the principle of impartiality is intended to ensure that the investigation is conducted objectively and without bias. As distinct from the principle of independence, impartiality focuses on the performance of the investigator, including the perception of his

102 See: The Public Commission to Assess the Methods of Appointing the Attorney–General and Issues Related to his Tenure REPORT (1998) [hereinafter: *The Shamgar Commission Report*]; See also: Resolution No. 2274 of the 28th Government of Israel, *Public Commission to Assess the Methods of Appointing the Attorney–General* (Aug. 20, 2000); Resolution No. 1773 of the 31st Government of Israel *Determining the Methods and Conditions for Appointing the Attorney–General – Government Decision Amendment* (Jun. 10, 2007).

103 See: *The Shamgar Commission Report*, *supra* note 102, at 69: 'In order for the Attorney–General to perform his duty without improper influences, either obvious or hidden, it is proper for a predetermined tenure to be established to bolster his independence, as is practiced in relation to other public office holders in the country (such as the State Comptroller or the Governor of the Bank of Israel)... [I]t should be taken into account that the position carries, as detailed, very broad authorities, and too long of a tenure should not be established since it would create a concentration of power for an extended period which could, in light of past experience and reasonable estimates, detract from the balance necessary in a proper democratic government. In light of these considerations the Commission suggests a single tenure of six years which is not extendable'.

performance. We will assess whether the way the MAG conducts an investigation conforms with this principle. This assessment will take into account the 'dual hat' worn by the MAG as he is the head of the military prosecution system, and the legal advisor to the military authorities, and whether there is a conflict of interest inherent to these dual roles.

54. As detailed in Chapter B, in some of the countries surveyed, the head of the military justice system also wears such a 'dual hat'. However, safeguards have been instituted to reduce the potential conflict of interest. These safeguards include weakening the prosecutorial functions of the MAG by strengthening the position of the director of military prosecutions (hereinafter: the DMP), despite his subordination to the MAG. Thus, in Canada, the following safeguards have been put in place: the Judge Advocate–General (hereinafter: the JAG) does not head the chain of command of the investigating authorities;[104] the orders received by the DMP from the JAG, regarding a specific prosecution, are submitted concurrently to the Minister of Defense and insofar as possible, they are made publicly available; the DMP is appointed by the Minister of Defense (and not by the JAG) for a period of four years (which may be extended).[105] Even though the Australian military justice system is different, similar safeguards exist: the DMP is appointed by the Minister of Defence for a fixed term not exceeding five years (which may be extended up to ten years), at the rank of Brigadier–General;[106] the DMP stands outside the military chain of command, and reports to the Minister of Defence; the DMP's independence is protected in statute and it is an offense to interfere with the DMP's prosecutorial decisions.[107]

55. As detailed in Chapter C, the Israeli MAG is in charge of two arms: the military prosecution system and the legal advice system. The Chief

104 See Annex C: *The Canadian Report*, at para. 91.

105 *Id.*, at para. 92.

106 See: Chapter B, para. 25.

107 *Id.*

Military Prosecutor (hereinafter: the CMP) heads the military prosecution, and his role is to assist the MAG and his deputy in utilizing their powers in the criminal sphere. However, only the legal advice system may give legal advice to the various military authorities. In light of this division within the MAG Corps between the prosecution system and the legal advice system, the MAG contended that a potential for a conflict of interest remains only with the MAG and his deputy (who wear 'dual hats') and does not extend throughout the military justice system.[108]

56. The Commission was presented with submissions that were critical of the MAG's 'dual hat' and its consistency with the principle of impartiality.[109] For example, in the submission to the Commission by the Israel Democracy Institute, it was argued: '[The MAG] effectively manages the Corps and is personally involved in a variety of decisions, relating both to consultancy [advisory] and to opening investigations. The conflict of interest between the consultancy role and the prosecution role is therefore clearly expressed in the role of a senior functionary in the military legal system, which is in *a potential conflict of interest* in investigations relating to decisions that he himself made'.[110]

On the other hand, the MAG contended before the Commission that, 'insofar as the phenomenon of the "dual hat" does in fact create alleged difficulties in fulfilling the enforcement duties of the MAG', it does so only in a few cases where there is overlap between the advice and the allegations. In such cases an appeal can be submitted to the Supreme Court.[111] The MAG further strengthened his position by comparing his 'dual hat' to the

108 See: *MAG Position Paper 2010*, *supra* note 72, at 68; For more on the division in the MAG Corps between the prosecution and the legal advice, see: Chapter C, para. 21.

109 See: *ACRI – Position Paper*, *supra* note 66, at 24.

110 See: *Shany, Cohen & Rosenzweig, Response Paper to MAG*, *supra* note 11, at 22; See also: Eyal Benvenisti, *The Examination and Investigation Duties regarding Violations of the Laws of Armed Conflict that apply to the State of Israel* 23–25 (Apr. 13, 2011) [hereinafter: *Benvenisti Opinion*].

111 See: *MAG Position Paper 2010*, *supra* note 72, at 69.

Attorney–General who advises the executive branch of government and also heads the Public Prosecution.[112]

57. Relevant to this discussion is the connection between legal advice and the initiation of an investigation, because a suspect of an offense might have the defense that he was acting upon legal advice, whether it was the MAG's or a different legal advisor's.[113] However, the dual hat of the MAG may give rise to a *perception of partiality*. In order to prevent this, the Commission recommends taking two measures: strengthening the status and the independence of the CMP so that it is similar to the status of the Israeli State Attorney, and regulating in legislation a procedure for appealing the MAG's decisions to the Attorney–General (Recommendation No. 13(A)).

Therefore, on the matter of the roles of the MAG, the Commission recommends:

Appointment of the CMP

58. Currently, the CMP has no unique status and he is appointed just like any military prosecutor.[114] This is contrary to the equivalent role in the civilian system – the State Attorney – who is appointed by a government resolution upon the recommendation of a search committee and whose term of office is fixed.[115] The current situation is also different from the way the aforementioned countries regulate the status of their DMPs.

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112 *Id.*, at 68.

113 See also: *Shany, Cohen & Rosenzweig, Response Paper to MAG*, *supra* note 11, at 21.

114 See: Article 181(a) of the Military Justice Law which determines that: 'the Chief of Staff, or whoever was authorized by him to do so, will appoint, upon the recommendation of the Military Advocate–General, officers with legal training to the position of military prosecutor; one of them, of at least four years legal experience, will be appointed as Chief Military Prosecutor'.

115 See: Resolution No. 1585 of the 30th Government of Israel, *Appointment Process for the Position of Attorney–General* (Feb. 29, 2004); See also: Resolution No. 2077 of the 31st Government of Israel, *Change in the Composition of the Committee to Locate Candidates for the Position of Attorney–General* (Jul. 22, 2007).

Therefore, the Commission recommends that the CMP be appointed by the Minister of Defense, on a recommendation of a committee chaired by the MAG. The CMP's tenure and rank should be determined in advance.[116]

Recommendation No. 9: CID Investigations

59. As detailed in Chapter A, one of the requirements that can be derived from the principle of effectiveness and thoroughness is that an investigation be conducted professionally.[117]

60. As evident from Chapter B, one of the ways countries ensure an effective and thorough investigation is by establishing special units for investigating incidents which raise a suspicion of a violation of international humanitarian law. For example, in both Australia and Canada, independent investigating units exist (ADFIS and CFNIS respectively) whose function is to investigate complex or especially serious incidents (including violations of international humanitarian law).[118] A similar unit exists within the Military Police of the Netherlands.[119]

61. As detailed in Chapter C, in 2007, the IDF established the MAG Corps for Operational Matters within the framework of the military prosecution system. This team specializes mainly in handling examination and investigation files for offenses arising from operational activity of the IDF, and offenses of IDF soldiers that are committed against a civilian population in territory administered by the IDF or during combat. The advocates in this branch undergo special training, including relevant legal training, operational seminars, study tours in the operational units and instructions by military professionals. The purpose of establishing

116 It should be emphasized that this recommendation may have wider implications. Thus, for example, it is possible that there would be a need to similarly regulate the status of the Chief Military Defender.

117 See: Chapter A, paras. 80, 102.

118 See: Chapter B, paras. 42–43, 46, 53; See also Annex C: *The Canadian Report*, at para. 62.

119 See: Chapter B, paras. 67–69; See also Annex C: *The Netherlands Report*, at para. 2.

this branch was to improve the handling of cases and strengthening the effectiveness and thoroughness of conducting investigations.[120] It should be noted that in the CID there is no investigative unit that is equivalent to the MAG Corps for Operational Matters, which specializes in the investigation of such complaints.

Therefore, on the matter of CID investigations, the Commission recommends:

CID for Operational Matters

62. The Commission has reached the conclusion that alongside the MAG Corps for Operational Matters within the military prosecution, there is a need to establish a department for Operational Matters within the CID. The military police officers that will be appointed to the CID for Operational Matters shall undergo training in international humanitarian law, generally, and the obligations on investigating violations of international humanitarian law in particular. In order to ensure direct communication with witnesses, complainants and other relevant parties to the investigation, the investigators should include persons that are fluent in Arabic. In order to promote the CID's accessibility to complainants, the CID for Operational Matters should have military bases deployed throughout the areas where the incidents under investigated occur.

Recommendation No. 10: Establishing the Investigation Timeframe

63. As detailed in Chapter A, and as stated in paragraph 37, the principle of promptness includes the obligations to quickly commence and conduct an investigation in a timely manner. An investigation conducted within a reasonable period of time contributes to the thoroughness and effectiveness

120 *MAG's Testimony – Part B*, *supra* note 47, at 25–27.

of the investigation and also to public confidence in the investigative system, and to the sense that justice is achieved.

64. The discussion in Chapter C demonstrated that in Israel there is no time limit allotted to an investigation, and from the files surveyed by the Commission, it appeared that the duration of these investigations sometimes extends over many years.[121]

65. Recently, Attorney–General Guideline 4.1202 became operative. The Guideline calls for the shortening of the duration of criminal proceedings (until the submission of an indictment) in the Public Prosecution. According to the Guideline:

> Prompt criminal procedures that clearly demonstrate the relationship between the perpetrator and the punishment are of vast importance as an educational and deterring factor towards perpetrators and even towards the public… As time passes the greater the difficulty to access full and credible evidence…
>
> Improving the pace of handling cases is also most important in terms of public confidence in the prosecution system. A prolonged delay in handling cases has a significant adverse impact on public confidence in the law enforcement system.[122]

The rationales detailed in the Attorney–General Guideline are valid for investigations into violations of international humanitarian law.

Therefore, on the matter of the duration of the investigation, the Commission recommends:

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121 See: *The A–Samouni Opinion*, *supra* note 19, in which the decision to close the file was made on 11 April 2012, approximately three and a half years after the incident; See also: THE SAMPLE EXAMINATION: File 154/09 where the MAG Corps request to expand the investigation was delivered to the CID a year and half after the original CID investigation file was handed to the MAG Corps.

122 See: *Duration of Handling a Claim until Submission of an Indictment*, ATTORNEY–GENERAL GUIDELINE 4.1202 (2010).

Establishing a Timeframe

66. The Commission concludes that a timeframe should be set for conducting investigations. The MAG in coordination with the Attorney–General shall set a period of time between the decision to open an investigation and the decision to adopt legal or disciplinary measures or to close the case. In order to guarantee that the regulated timeframe is adhered to, and in order to allow for adequate review, the MAG shall publish, at least once a year, statistical data on the period of time taken to handle files.

Recommendation No. 11: Transparency of Proceedings

67. As evident from Chapter A, the principle of transparency that is required for an 'effective investigation' has two aspects: the first is intended to guarantee the rights of the victims, and the second ensures public scrutiny of the investigative and prosecutorial processes.

68. The first aspect of the principle of transparency does not apply to investigations into incidents of 'actual combat'.[123] It should be noted that the Rights of Victims of Crime Law, 5761–2001 regulates the rights of victims of crime to access information about a criminal proceeding.[124] Thus, the Rights of Victims of Crime Law applies only to offenses investigated by the Israeli police or the PIID while the offenses investigated by the CID are excluded from this Law.[125]

In relation to the second aspect of the principle of tranparency, the Commission found that in some of the MAG Corps' files that were examined,

123 See: Chapter A, para. 106.

124 Article 8 of the Rights of Victims of Crime Law, 5761–2001, LA 183.

125 *Id.*, at Article 2, states that the Law applies only to offenses that are investigated by the Israel Police or the PIID.

the documentation in the file was overly brief, and in some of the cases it did not accurately reflect the procedures that were performed.

Therefore, on the matter of transparency, the Commission recommends:

A. Victims' Rights

69. The Commission recommends that the arrangements provided in the Rights of Victims of Crime Law relating to the reciept of information on criminal proceedings shall also be applied *mutatis mutandis* to persons injured by *law enforcement activity* by the security forces that are investigated by the CID. (It should be noted that below we will present a recommendation that the CID should also investigate incidents involving police forces, to which the Rights of Victims of Crime Law already applies (Recommendation No. 14)).

B. Documenting in a File

70. As noted above, the MAG Corps' files form a base of information that facilitates periodic internal checks and reviews by the MAG Corps. This base of information can also be relied on by oversight and review mechanisms. Documentation also assists and guides prosecutors with regards to administering files. The Commission recommends that the MAG Corps implement a strict documentation procedure, especially in files of investigations of violations of international humanitarian law.

Oversight and Review of the MAG Corps

71. The obligation to establish oversight and review mechanisms and the manner in which such mechanisms should be conducted, are generally derived from domestic legal principles and from the international law principles of independence and effectiveness for an 'effective investigation'. The survey of the six countries in Chapter B and the overall structure of Israel's justice system can also aid in understanding the scope of these mechanisms. First we will assess the way the MAG's decisions in his role as legal advisor to the military authorities are subject to oversight by the Attorney–General. Subsequently, we will assess the way the MAG's decisions in his role as head of the military prosecution system are reviewed. The recommendations concerning oversight and review are largely institutional and are therefore based on Israeli law and practice.

Recommendation No. 12: Oversight of the Legal Advice given by the MAG Corps

72. In the civil justice systems of some of the countries that were surveyed in Chapter B, there are bodies that advise on the application of international humanitarian law. In the United States, the Department of Justice advises in the field of the laws of war to other arms of the executive branch, and it is the final arbiter in cases where controversy exists regarding legal interpretation between the Department of Defense and the military justice system and other authorities (such as the State Department).[126]

73. As specified in Chapter C, the Attorney–General has the authority to give professional guidance to the MAG.[127] According to the Supreme Court, 'like all government systems, also the MAG is subject to the professional

126 See: Chapter B, para. 21; See also Annex C: *The US Report*, at para. 85.

127 See: Chapter C, para. 62.

directives of the Attorney–General and to his legal opinion'.[128] Attorney–General Guideline 4.5000 determines that the professional independence of the MAG is 'internal', since the MAG does not operate 'detached and separately from the general law enforcement system and the protection of the rule of law over which the Attorney–General is in charge'.[129]

The issue of the MAG's professional subordination to the Attorney–General was raised before the Commission. Professor Eyal Benvenisti was critical of the performance of the Attorney–General in exercising his oversight powers. He contended, *inter alia*, that 'in practice the Attorney–General is satisfied with a broad and full delegation of his power in the vital area of the laws of war and by so doing abdicates his duty'.[130] Also, the representative of B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories testified: 'unfortunately in all of our attempts to conduct a conversation with the Attorney–General regarding questions of policy, he referred us to the MAG'.[131] On this matter, the Deputy State Attorney (Special Assignments) testified that the expertise in international humanitarian law lies primarily in the military.[132]

Therefore, on the matter of oversight of the MAG Corps, the Commission recommends:

International Law Unit in the Ministry of Justice – Advice

74. The material that was submitted to the Commission and presented

128 *Atiya* case, *supra* note 95, at para. 11 of Justice Beinisch's judgment.

129 *Fatal Accidents in the IDF – Appeal to the Attorney–General against a Decision of the Military Advocate–General to Close an Investigation File*, ATTORNEY–GENERAL GUIDELINE 4.5000 (2002) [hereinafter: ATTORNEY–GENERAL GUIDELINE 4.5000].

130 See: *Benvenisti Opinion, supra* note 110, at 25.

131 See: Transcript – Part B, session no. 2 "B'Tselem Testimony – The Israeli Information Center for Human Rights in the Occupied Territories" 16 (Apr. 11, 2011).

132 See: Transcript – Part B, session no. 11 "Testimony of Attorney–General and Testimony of Deputy State Attorney (Special Assignments)" 87 (Apr. 10, 2011) [hereinafter: *Testimony of the Attorney–General* and *Testimony of the Deputy State Attorney (Special Assignments)*].

in Chapter C suggests that the advice in the field of international humanitarian law is decentralized and is spread out over various bodies in the civil system. There is no advisory body within the Ministry of Justice that coordinates the international legal aspects of the security forces activity. In contrast, in the legal advice system at the MAG Corps there is an International Law Department (hereinafter: ILD).

In order to strengthen the Attorney–General in exercising his oversight powers over the MAG, the Commission recommends establishing a unit within the Advice and Legislation Department at the Ministry of Justice that shall specialize in international humanitarian law. For this purpose, administrative work should be undertaken to formulate positions and suitable training for this unit. Additionally, a permanent communication channel should be formed between the bodies dealing with this issue – the MAG Corps, the Ministry of Defense, the State Prosecution, the Ministry of Foreign Affairs, the National Security Council, etc. – and the unit that will be established. This recommendation has no intention of detracting from the roles of the ILD in the legal advice system of the MAG Corps and the ILD should be preserved as the center of expertise in the field of international law within the IDF.

Recommendation No. 13: Individual and Systemic Review of the Military Prosecution System

75. As detailed in Chapter B, review mechanisms exist in some of the countries surveyed. In Canada, the military police are subject to the review of the Military Police Complaints Commission (MPCC). The MPCC is a civilian body with quasi–judicial status, established to strengthen the accountability and independence of military police in relation to military police investigations.[133] In Australia, the Inspector–General of the ADF (IGADF) is intended to provide the Chief of the Defence Force with a

133 See: Chapter B, para. 23; See also Annex C: *The Canadian Report*, at paras. 104–105.

mechanism for internal audit of the military justice system which has the ability to expose, examine and remedy failures and flaws in the military justice system. The IGADF assesses such matters as abuse of authority and lack of procedural fairness as well as instances of cover–up or failure to act.[134] In the UK, the Service police are subject to inspection by Her Majesty's Inspectorate of Constabulary (HMIC). Since 2011, HMIC reports to the Secretary of State on the independence and effectiveness of military police investigations.[135]

76. As described in Chapter C, the Attorney–General has review discretion over the military justice system.[136] On this matter the Israeli Supreme Court held that:

> The Attorney–General is entitled to intervene, and even instruct the MAG on how to conduct himself in decisions that in his opinion are of *a special interest to the public* or where he finds that their *implications exceed beyond the areas of the military framework*. The intervention of the Attorney–General in these matters should be performed in the framework of his role as the person who bears supreme responsibility for the various prosecution authorities and the legal bodies in the executive branch.[137]

Thus the Court ruled that fatal accidents in the IDF bear 'special interest to the public' in which there is room for the Attorney–General to intervene. The Court asserted that, 'this intervention derives from the issue being a matter of public interest of the first order and concerns the protection of human life that was entrusted to the military system'.[138] The Attorney–General's authority to intervene in such cases is expressed in a designated

134 See: Chapter B, para. 25; See also Annex C: *The Australian Report*, at para. 66.

135 See: Chapter B, para. 27; See also Annex C: *The UK Report*, at para. 3.44.

136 See: Chapter C, para. 63.

137 *Atiya* case, *supra* note 95, at para. 11 of Justice Beinisch's judgment [emphasis added].

138 *Id.*

guideline, according to which a complainant can object to the Attorney–General the MAG's decision not to investigate or not to indict due to a fatal accident.[139] In the words of the guideline:

> Where, in the opinion of the Attorney–General, a decision of the military prosecution not to investigate or not to prosecute and especially in connection with a fatal incident requires the Attorney–General's intervention because it is not consistent with appropriate law enforcement policy, he is entitled, and may even be obliged to intervene. This is due to his unique position as head of the Public Prosecution and the legal advice, and as the authoritative interpreter of the law to all arms of the executive branch including the military and security systems.[140]

77. The Deputy State Attorney (Special Assignments), in his testimony before the Commission, highlighted the importance of complaints regarding violations of international humanitarian law, and claimed that the public interest that these cases raise, justifies the option of providing the right of appeal against decisions of the MAG not to open an investigation. In his words:

> ... You sir proposed, why shouldn't an appeal procedure be established? In fact it exists. We announce this everywhere. It's written on paper... Families [of the injured and the deceased] know this. People are familiar with this. In issues that have public interest that exceeds the military's boundaries, and in general an allegation that a soldier killed a person while violating the laws of war is a matter that has public interest exceeding the military boundaries, *an appeal can be filed*.[141]

However, the Deputy State Attorney (Special Assignments) noted that

139 Attorney–General Guideline 4.5000, *supra* note 129, at 20.

140 *Id.*, at para. 4.

141 See: *Testimony of the Deputy State Attorney (Special Assignments)*, *supra* note 132, at 25 [emphasis added].

an appeal procedure was never formally regulated.[142] The MAG, on his part, opposed institutionalizing the appeal procedure. He argued that institutionalizing the appeal in legislation could erode the authority and status of the MAG.[143]

It should be noted, that the Commission is unaware of any decision by the Attorney–General to open an investigation against the MAG's position.[144]

78. In the framework of the discussion of review of the military justice system in Israel, the question of systemic review should be addressed. The appeal to the Attorney–General (discussed above) is an individual procedure for review of a specific case. In contrast, systemic review deals with an over–arching review of a system's general functioning. Over the past few years, public debate has arisen over whether an over–arching review body of the civilian enforcement system should be established. Recently, the Attorney–General transferred to the Knesset State Control Committee a draft of a summary report prepared by the Team for Examining the Establishment of a Complaints Commission on the Civilian Prosecution. The team recommended designing 'a designated review mechanism that deals with proactive and constant review over the prosecution system'.[145] Amongst the justifications for establishing the complaints commission, it was emphasized that there is 'a serious deficiency specifically in systemic review'.[146] According to the team, the proposed body will provide the Attorney–General with a 'managerial and review tool to deal with the manner in which the prosecution system operates'. This tool is 'intended to

142 *Id.*, at 26.

143 *Meeting with MAG*, *supra* note 46, at 6.

144 See: *Shany, Cohen & Rosenzweig, Response Paper to MAG*, *supra* note 11, at 28: 'Practically, to the best of our knowledge, there are no recent examples of cases where the Attorney General ruled against the MAG's position to open a military investigation due to an IHL violation'.

145 See: *Draft Summary of the Team's Summarizing Report to examine the applicable possibility of establishing a complaint authority for the State Attorney* (draft accurate to Feb. 12, 2010).

146 Protocol of meeting no. 240 of the State Control Committee, the 18th Knesset (Feb. 13, 2012).

reinforce public confidence' because systemic review by an institutionalized body will improve the performance of the prosecution system.[147] These comments are also valid for our purposes.

Indeed, it is important to note, for the sake of completeness, that the MAG's decision not to open investigation is of course subject to the review of the Supreme Court within the framework of petitions submitted to the Court.[148] In practice, however, the ability of the Court to review such decisions is rather limited. This is because, *inter alia,* a petition to the Supreme Court is usually submitted long after the incident in question.[149] In the words of the Supreme Court:

> ... [T]he request for the remedy of a criminal investigation or instituting a criminal proceeding... is a request with an 'expiration date'. When time passes from an event that is in the subject of a request of this type, there is longer any point to the request.[150]

The Court's function as a review mechanism of the MAG's decision not to open an investigation is therefore limited.

Therefore on the matter of individual and systemic review over the MAG Corps, the Commission recommends:

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147 *Id.*

148 See: *Testimony of the Attorney–General*, *supra* note 132, at 12–13: 'the Supreme Court, in its role as High Court of Justice supervises the decisions of the Attorney–General and the State Attorney's Office, as well as the decisions of the MAG. The Court, in the past, intervened in decisions on indictment, including in cases where it was claimed that soldiers should be indicted for actions performed during a military operation or in relation to it. The High Court of Justice's supervision also constitutes part of the examination mechanism regarding complaints and claims of violations of the laws of war'.

149 For example, see: HCJ 5817/08 *Aramin v. Attorney–General* (still unpublished, Jul. 10, 2011) [hereinafter: *Aramin* case] which dealt with the decision not to indict Border Police officers for an incident where a ten year old girl from the West Bank died from a head injury. The High Court of Justice decision was given more than four years after the incident. For the extent to which the HCJ intervenes in the MAG's decisions see also: Chapter C para. 65.

150 See: HCJ 3292/07 *Adalah – The Legal Centre for Arab Minority Rights v. Attorney–General* (still unpublished, Dec. 8, 2011), at para. 15 of President Beinisch's judgment.

A. Individual Review – Appeal to the Attorney–General

79. It appears that according to the accepted normative approach in Israel, there is a requirement to regulate the review of the civilian system over the military system on issues that bear 'special interest to the public' or that 'their implications exceed beyond the areas of the military framework'.[151] The Commission therefore recommends the enactment of an appeal procedure to the Attorney–General concerning decisions of the MAG. This legislation should determine the period of time for filing an appeal and for the Attorney–General to hand down his decision on the appeal.[152]

B. Systemic Review – The Complaints Commission for the State Prosecution

80. The Commission recommends that when the complaints commission for the civilian Prosecution is established, it should be authorized to review all the branches of the military prosecution and to monitor the bodies at the IDF that conduct examinations and investigations. This is in order to ensure that the MAG's regulations and policy are being implemented *de facto*.

2. The Body that Investigates Complaints against Police Officers

Recommendation No. 14: The Handling of Complaints against Police Officers

81. The principles required for an effective investigation, outlined in Chapter A, apply equally to the conduct of investigations of suspected

151 *Atiya* case, *supra* note 95, at para. 11 of Justice Beinisch's judgment; See also: Attorney–General Guideline 4.5000, *supra* note 129, at 2.

152 See: Article 65 of the Criminal Procedure Law [Consolidated Version], 5742–1982, LA 1043; Attorney–General Guideline 4.5000, *supra* note 129.

violations of international humanitarian law, whether carried out by the army, the police or any other investigative body.

82. In Israel, as described in Chapter C, the Police Internal Investigations Department at the Ministry of Justice (PIID) investigates complaints filed against police officers, including complaints of violations of international humanitarian law.[153] It therefore appears that investigations of complaints against police officers are not conducted within the police. However, there are exceptions to this rule.[154] The main exception is shooting incidents by the Border Police ('green police') in the West Bank which *are* investigated by the police. It should be noted that most complaints against police officers for violations of international humanitarian law are such shooting incidents.

When the PIID was established in 1992 such shooting incidents were supposed to be handled by them. However, in that year the handling was transferred to the investigative branch of the Judea and Samaria District of the Israel Police. In 2007, the State Attorney decided to cancel this change of policy and to return the investigation of shooting incidents that occur in the West Bank to the PIID in a gradual process that was to have been completed by 1 January 2009.[155] The State Attorney's decision, on handing back responsibility for investigating police shooting incidents to the PIID, was never fully implemented and thus the *de facto* responsibility remained in the hands of the Judea and Samaria District of the Israel Police.[156]

83. For our purposes, it is relevant to consider whether the IDF is the appropriate body to handle these investigations because, according to the Security Provisions Order, police activity in the West Bank is subordinate

153 See: Chapter C, paras. 43–44.

154 *Id.*, at para. 44.

155 *Id.*

156 *Id.*

to the IDF commander in the region, and their powers are equivalent to the powers of IDF soldiers.[157] Furthermore, the characteristics of the 'green police' activity in the West Bank resemble the characteristics of IDF activity.[158] As discussed in Chapter C, there is a dispute between the Ministry of Justice and the police on the question of the appropriate body to investigate police officers that were involved in such incidents. In 2011 the head of the PIID recommended that shooting incidents involving police in the West Bank should be investigated by the military.[159] One of the reasons he gave was that the PIID do not have adequate expertise: 'the investigations require cumulative knowledge about the realities on the ground and about the military orders and their compatibility – where required – with international law. This complex issue is in the clear field of expertise of the military investigative authorities and the military legal experts... This is a field which is alien to the work of the department [PIID]'.

84. In practice, investigations into shooting incidents by green police in the West Bank are handled by the police (Judea and Samaria District of the Israel Police). Therefore, it is necessary to assess whether these investigations conform with the principles for an effective investigation as outlined in Chapter A. The accepted approach in Israel is that the investigation of police by police, at least in terms of perception, compromises the independence of the investigation.[160] The Commission is of the view

157 *Id.*, at para. 42; Order Regarding Security Instructions [consolidated version] (Judea and Samaria) (no. 1651), 5770–2009; This order replaced the Order Regarding Police Forces Operating in Judea and Samaria in Coordination with the IDF (no. 52) 5727–1967, which regulated police activity in the West Bank and their powers. See particularly: Article 1 according to which police forces operating in the West Bank are viewed as 'policemen and officers in the Israel Police, placed under the command of the IDF forces commander in the territories', and Article 4 according to which every police officer is granted the powers equivalent to any soldier set out in the security legislation.

158 See: Chapter C, para. 42. Border Police soldiers are recruited as an alternative to military service, they undergo infantry basic training and their officer training course is shared with the IDF rather than the Police. See further: *Border Police*, IDF website, *available at:* www.aka.idf.il/giyus/general/?catId=23067&docId=31509.

159 See: letter from Herzl Shaviro, Head of the PIID, to Attorney–General, Moshe Lador, *Identity of Investigating Body for Border Police Shooting Incidents in Judea and Samaria and Stalling the Decisions to Transfer Investigation Authority on the Matter to the CID* (Jan. 30, 2011); See also: Chapter C, paras. 44–45.

160 This approach is reflected in, *inter alia*, the establishment of the PIID (See: Chapter C para. 43) and in the State Attorney's decision of 2007 (*Id.*, at para. 44).

that the handling of complaints against police, in the format described in Chapter C, also occasionally hinders the promptness of the investigation. The reason for this is that the identity of the perpetrator (a soldier or a Border Police officer) impacts upon the determination of the appropriate investigative body. The lack of clarity – both for complainants and for those responsible for investigations – on the question of who will investigate, IDF or Israel Police, often causes complications for the investigation process and causes significant delays.[161] Moreover, when the complaint concerns an incident in which both soldiers and police officers participated together, or when it is unclear which of these forces participated in the incident, the investigation process has a number of stages. First the MAG Corps examines the identity of those involved in the incident and only after it has reached conclusions about the involved soldiers or after it becomes clear that the complaints are only against police officers (and not soldiers) is the file handed over to the police.[162] From this point on, there is no orderly structure for how complaints are handled: sometimes the Deputy State Attorney (Criminal Matters) makes a decision on whether to open an investigation, and sometimes the file is transferred directly to the police and an investigation is opened without a preliminary decision of the Deputy State Attorney.[163] This situation detracts from the promptness of the investigation and also from its effectiveness and thoroughness. It is important to emphasize that, in order for investigations of suspicions of violations of international humanitarian law in the West Bank to meet

161 See for example: THE SAMPLE EXAMINATION: File 427/07 which dealt with an incident in which the Police Undercover Unit were involved. The transfer of the operational debriefs to the Deputy State Attorney (Criminal Matters) occurred approximately three and a half years after the incident.

162 See for example: *Summary of Discussion of Aug. 7, 2011 Regarding Transfer of CID case 195/07 – The Injury of Mahmud Abu Slalcha in Nablus on Jan. 18, 2007* (Deputy State Attorney's Office (Criminal Matters), Aug. 15, 2011). The discussion dealt with a file that concerned an incident involving both Border Police and IDF soldiers. First the file was examined by the military prosecutor who decided that 'there is insufficient evidence to prosecute any IDF soldiers'. Following this, the file was transferred to the Deputy State Attorney 'in order to examine the need for a continued investigation into the Border Police forces who took part in the operation'. The file reached the Deputy State Attorney on 29 March 2011 (over four years after the incident) and it was decided that the file would be transferred to the police for further investigation. In the summary discussion of this file the Deputy State Attorney determined that the investigation method practiced in cases that involved both forces 'is not efficient and it is doubtful whether it is sufficient to arrive at the truth, and this is clear'.

163 See: Chapter C, paras. 46, 102.

the principles of effectiveness and thoroughness, the investigators must be professional and have experience in the fields of their investigations and they also must be equipped with the appropriate tools that are necessary to perform the examination and investigation process in the relevant area.[164]

Apart from the difficulty posed by the fragmented handling of complaints – especially between the IDF and the police – the Commission was presented with material suggesting practical difficulties in the way the Judea and Samaria District manages investigations.[165]

Therefore, on the matter of the handling of complaints against police, the Commission recommends:

Examining and investigating Police activity under IDF command

85. The Commission is of the view that where there are alleged violations of international humanitarian law following *police activity carried out under the IDF command*, these allegations should be examined and investigated by the IDF and not by the police. The Commission was satisfied that the examination and investigation bodies in the IDF, and especially the MAG Corps, have the experience and requisite expertise to handle such investigations, as well as proficiency in the applicable law to such activity (in this context see also Recommendation No. 9, on the CID for operational matters).

The Commission therefore recommends that the examination and investigation of complaints against police officers assigned to the IDF for

164 Meeting between Hoshea Gottlieb, the Commission's Coordinator, and Uri Carmel, Head of the Police Internal Investigation Department, 1–2 (Sep. 22, 2011); See also: *Testimony of the Deputy State Attorney (Special Assignments)*, *supra* note 132, at 50.

165 See, for example: *Aramin* case, *supra* note 149, at paras. 18–19 of President Beinisch's judgment. See also summaries of Discussions at the Deputy State Attorney's office (Criminal Matters): *Summary of May 16, 2007 Meeting – Transfer of Police Inquiries Regarding Shooting Incidents* (May 20, 2007); *Shooting Incident Without Inquiry* (Feb. 25, 2009); *Summary of Jul. 28, 2009 Discussion – Police Inquiries* (Oct. 15, 2009).

violations of international humanitarian law in the West Bank shall be carried out by the IDF.[166]

3. The Body that Investigates Complaints against ISA Interrogators

Recommendation No. 15: The Handling of Complaints against ISA Interrogators

86. As stated in Chapter A, according to international law – namely, international humanitarian law and international human rights law – an investigation does not necessarily mean a criminal investigation.[167] In other words, investigations of soldiers, police officers or other security agents can take various forms as long as the investigation adheres to the principles of an 'effective investigation'.

87. As detailed in Chapter C, in 1992 Israel established a special investigative mechanism to examine complaints against ISA interrogators made by interrogated persons.[168] According to this mechanism, the complaints are transferred to the Interrogatee Complaints Comptroller (Mavtan) who is a senior ISA employee that never worked in the Investigations Department of the ISA, and who is authorized as a disciplinary investigator.[169] The Mavtan investigates the complaints and transfers his findings to 'the Mavtan's Supervisor'. The Mavtan's Supervisor formulates a recommendation on whether there is a basis

166 This recommendation has broader ramifications and extends beyond police activity in the West Bank to include *all* activity under the IDF command, for example the Israel Prison Service's activity under the Navy's command during the maritime incident of 31 May 2010.

167 See: Chapter A, paras. 62, 65; It should be noted that the ISA activity may take place either in Israel or in the West Bank and the complaints submitted are usually allegations of torture or inhuman treatment which are offenses according to international humanitarian law as well as according to international human rights law.

168 See: Chapter C, paras. 47–49.

169 *Id.*, at para. 48.

for opening a criminal investigation, whether it should be referred to disciplinary proceedings, whether the matter should be investigated further or whether the file should be closed. The findings of the Mavtan and the recommendation of the Mavtan's Supervisor are transferred to the Attorney–General, or to whomever the Attorney–General delegates his power, who makes a decision on whether to open a criminal investigation. If it is decided to open a criminal investigation, the file is transferred for the PIID to investigate.

88. Representatives of the Public Committee against Torture in Israel claimed before the Commission that since the establishment of the Mavtan in 1992, 'over 700 complaints [were submitted to the Mavtan] and not a single criminal investigation was opened'.[170] And indeed, from the material submitted to the Commission, it appears that the Mavtan and the Mavtan's Supervisor have never recommended that a criminal investigation be initiated on the basis of a complaint, and the Attorney–General has never instructed that such a criminal investigation be opened.[171] The head of the ISA presented the Commission with an explanation for the discrepancy between the number of complaints that were filed and the lack of criminal investigations. He contended that the large number of complaints submitted to the Mavtan stems, *inter alia*, from the fact that the interrogatees who confessed, or incriminated others, sometimes falsely accuse their interrogators so that they are not considered to be persons who had 'broken' under investigation or as collaborators with Israel.[172] Following such allegations criminal investigations are not opened.

89. In 2007, the State Attorney's Office conducted an examination of

170 See: Transcript – Part B, session no. 11 "Testimony of Public Committee Against Torture in Israel" 2 (Apr. 12, 2011).

171 It should be noted that there were complaints that led to disciplinary measures or to a change in interrogation procedures without holding the interrogators accountable. See also on this issue: *Testimony of the Deputy State Attorney (Special Assignments)*, *supra* note 132, at 55–56.

172 See: Transcript – Part B, session no. 12 "Testimony of the Head of the Israel Security Agency" 15 (Apr. 12, 2011) [hereinafter: *ISA Testimony*].

this investigation mechanism which was prompted by criticism leveled against the Mavtan. The conclusions and recommendations that were formulated by the State Attorney's Office were based on their day–to–day experience working with the Mavtan, and on a sample examination of files that the Mavtan investigated.[173] The examination's conclusions included the finding that the Mavtan 'is very limited in his skills as an investigator' and his questions are 'laconic'. It further determined that the Mavtan 'does not know how to confront his interogatees with diverse findings and conflicting testimonies, and he does not always investigate all of the interrogators relevant to the complaint. This problem is exacerbated by the fact that he has to investigate talented and experienced interrogators'. The conclusions of the State Attorney's examination also found that the investigation process of the Mavtan takes too much time. An additional flaw that the examination identified was that ISA interrogations are not sufficiently documented, and that this lack of documentation creates a difficulty for the Mavtan's investigations. The examination did, however, note that 'a significant improvement in documenting the interrogation has taken place'.[174]

Following the conclusions of this examination, in 2010 the Attorney–General decided that the Mavtan will no longer be an ISA worker, but a worker at the Ministry of Justice. Two of the main reasons behind the decision were:

> The *first reason* concerns a *problem of performance*, i.e., the inherent difficulty of the Mavtan to fulfill his role, by virtue of the fact that he is a worker of the Israel Security Agency, who is inspecting the activity of his colleagues. *The second reason* primarily concerns the *problem of perception*, i.e., the difficulty to justify a situation where an individual who is perceived to be

173 See: letter from Deputy State Attorney (Criminal Affairs), Mr. Yehoshua Lamberger, to State Attorney Eran Shendar, *Sample Examination of Mavtan Files* (Oct. 9, 2007).

174 *Id.*

internal to the Israel Security Agency examines complaints – ostensibly criminal – against his colleagues in the service.[175]

To date, the Attorney–General's decision has not been implemented.

90. The flaws described above raise serious doubts about the ability of the Mavtan to conduct an 'effective investigation'. Due to these flaws described in the conclusions of the State Attorney's examination, there are serious failures in the effectiveness and thoroughness and also in the promptness of the investigation process. To this we should add that the said 2010 decision of the Attorney–General emphasized the lack of independence in the Mavtan's investigation process, as well as a perception of a lack of independence, because 'he is a worker of the Israel Security Agency who is inspecting the activity of his colleagues'. The fact that no criminal investigations were ever opened only exacerbates these concerns.[176]

Therefore, on the matter concerning the handling of complaints against ISA interrogators, the Commission recommends:

A. Transferring the Mavtan's role to the PIID

91. The Commission recommends transferring the Mavtan's role to the PIID at the Ministry of Justice so that the Mavtan's Supervisor will be the Head of the PIID. The Attorney–General will continue to decide whether to open a criminal investigation on the basis of the findings of the Mavtan and the recommendation of the Mavtan's Supervisor. Transferring the Mavtan's role to the PIID creates consistency with the other investigative

175 *Transfer of the Mavtan to the Ministry of Justice* (Summary of Discussion of Oct. 4, 2010, Attorney–General's office, Nov. 11, 2010).

176 It should be noted that meanwhile the Supreme Court handed down a decision on the legality of the special investigative mechanism to examine complaints by ISA interrogatees against their interrogators. See: HCJ 1265/11 *Public Committee Against Torture in Israel v. Attorney–General* (still unpublished, Aug. 6, 2012);

processes in which the discretion to open an investigation is limited to the Attorney–General.[177]

B. Documenting ISA Interrogations

92. Documenting ISA interrogations will reinforce the thoroughness and effectiveness of the Mavtan's investigation. In the said examination by the State Attorney's Office, and in testimonies presented to the Commission, the issue of documenting ISA interrogations arose. The head of the ISA suggested that visual recording of ISA interrogations should be seriously considered. In his words: 'even if not everyone always likes it I think that it would be proper'.[178] The Commission therefore recommends that there shall be full visual documentation of the interrogations, according to rules that will be determined by the Attorney–General in coordination with the head of the ISA.

4. The Body that Investigates Complaints against Wardens

Recommendation No. 16: The Handling of Complaints against Wardens

93. As discussed in Chapter A, the responsibility to investigate includes maintaining mechanisms that ensure that investigations are conducted effectively and thoroughly.

94. As discussed in Chapter C, the National Prison Wardens Investigation Unit (NPWIU) is responsible for examining and investigating claims of criminal offenses by members of the Israel Prison Service. Therefore, this

177 See: *Investigation of Public Figures*, Attorney–General Guideline 4.2200 (2003).

178 See: *ISA Testimony*, *supra* note 172, at 22–23. See also: Criminal Procedure Law (Investigating Suspects), 5762–2002, LA 1855, at Article 17.

is the unit that handles complaints and claims concerning violations of international humanitarian law. Most of the investigators of this unit are appointed to the position after training as police investigators and serving in the National Unit for International Investigations.[179]

Therefore, on the matter of training investigators, the Commission recommends:

Training

95. The head of the Investigations and Intelligence Department at the police should ensure that in the framework of training the investigators, proper emphasis is placed on the relevant rules of international law, especially the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[180] the UN Standard Minimum Rules for the Treatment of Prisoners,[181] the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[182] and the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).[183] This recommendation applies to all of the bodies that deal with investigations into incidents to which international law applies (see above Recommendation No. 9).

179 See: Chapter C, para. 51; It should be noted that the commission did not meet an NPWIU representative and it did not thoroughly asses the conduct of this organization.

180 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S 85 (1984) (Israel signed the convention on Oct. 22, 1986 and ratified it on Oct. 3, 1991).

181 Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

182 U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4/Annex 2 (1999).

183 Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol'), U.N. Doc. HR/P/PT/8/Rev.1 (Aug. 9, 1999).

5. The Body that Investigates Complaints against the Civilian Echelon

Recommendation No. 17: The Handling of Complaints against the Civilian Echelon

96. As noted in Chapter A (and above in paragraph 86 regarding the ISA), when there is an obligation according to international law to open an investigation, it does not necessarily have to be a criminal investigation but it must adhere to the principles for an 'effective investigation'. An example of an effective investigation that is not criminal, but is recognized by international law, is a commission of inquiry.[184]

97. As detailed in Chapter B, it is accepted practice in the six countries surveyed to use commissions of inquiry as a tool for investigating allegations of violations of international humanitarian law by senior military personnel or civilian echelons. These commissions can be initiated by parliament or government.[185] Furthermore, the government may order commissions of inquiry into events of public interest or concern, including an apprehension that violations of international humanitarian law occurred. In Canada, the government is authorized to appoint a public inquiry to investigate important events. One example is the Commission of Inquiry into the Deployment of the Canadian Forces in Somalia (1994–1997) which examined, *inter alia*, accusations of torture and murder of a Somali prisoner captured by Canadian soldiers.[186] In the UK, the Inquiries Act of 2005 authorizes any minister to initiate a public inquiry into an event arousing public interest, and to appoint the members of the commission.[187]

184 See also: Chapter A, paras. 62, 65.

185 See: Chapter B, paras. 54, 59, 71; See also Annex C: *The US Report*, at paras. 15, 52; *The Australian Report*, at para. 28. See also on this matter: Senate Foreign Affairs, Defence and Trade Committees, *Duties of the Australian Personnel in Iraq* (Aug. 18, 2005), *available at:* www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004–07/iraq/report/index.htm.

186 See Annex C: *The Canadian Report*, at para. 24.

187 See: Inquiries Act (2005 c. 12), s. 4.

Two examples that are pertinent to our discussion are the Baha Mousa and Al Sweady Inquiries. The Baha Mousa Inquiry, established in 2008 and chaired by a former judge of the UK Appeals Court, involved a public inquiry to examine the death in UK custody in Basra of an Iraqi citizen. The Al Sweady Inquiry, established in 2009 and chaired by a retired UK High Court judge, involved a public inquiry into allegations of unlawful killing and mistreatment of Iraqi detainees by British soldiers in Basra.[188]

98. As discussed in Chapter C, in Israel, aside from the criminal examination and investigation process,[189] the government establishes, when necessary and at its discretion, State or Government Commissions of Inquiry, to investigate subjects of special importance.[190] Some of them – such as the Kahan Commission, the Winograd Commission and the Turkel Commission – dealt with issues concerning violations of international humanitarian law.[191] It should be noted that commissions of inquiry are established on an *ad hoc* basis to investigate exceptional events which allow the permanent investigation mechanisms to invest their resources in routine events and refrain from diverting resources to management by exception.

Therefore, on the matter of the handling of complaints against the civilian echelon in the framework of commissions of inquiry, the Commission recommends:

188 For further reading, see Annex C: *The UK Report*, at paras. 1.33–1.37.

189 See: Chapter C, paras. 52–54.

190 See: Chapter C, paras. 55–58.

191 See also: *Testimony of the Deputy State Attorney (Special Assignments)*, *supra* note 132, at 37.

Commissions of Inquiry

99. The Commission concludes that the system of investigation by commissions of inquiry (and examination) which is well established in Israel satisfies Israel's legal obligations under international law to investigate acts, decisions or omissions[192] that give rise to a suspicion of serious violations of international humanitarian law (for example, the Kahan Commission).[193] The Israeli commissions of inquiry system allows those commissions to meet the requirements of an 'effective investigation'. The Commission is of the opinion that according to international law and the accepted practice in the countries surveyed, the fact that the government establishes a commission of inquiry does not, in itself, compromise the independence of the commission.[194]

The government must take steps to ensure that a commission's terms of reference guarantee that it will operate in an independent fashion and that the members of a commission have no conflict of interest with the subject of the investigation. Moreover, the terms of reference must ensure an effective and thorough investigation, by appointing professional members with experience and knowledge in the subject of the commission's mandate, as well as by defining the commission's powers, including allowing access to all evidence. It is desirable that when investigating a subject of alleged violations of international humanitarian law, a term shall be set in advance for the duration of the commission and the submission of its recommendations.

192 This conclusion should be read in light of Recommendation No. 2 on incorporating into legislation the criminal responsibility of civilian superiors. See also: Chapter A, para. 26.

193 See also: Chapter A, para. 65.

194 See: Chapter A, para. 72

Recommendation No. 18: Implementation of the Commission's Recommendations

On the matter of implementing this Report, the Commission recommends:

A. MAG Guidelines

100. The Commission recommends that, similar to the State Attorney Guidelines and the Attorney–General Guidelines, the MAG shall also publish a comprehensive and updated handbook for the examination and investigation mechanisms at the IDF. The handbook should lay down guidelines for the examination and investigation mechanisms that shall be publicly available.[195] The MAG's guidelines will form the IDF guide on examining and investigating complaints and claims regarding violations of international humanitarian law. Some of the recommendations in this Report deal with practices and rules that derive from Israel's obligations under international law. The MAG's guidelines should incorporate the guidelines and procedures that will be formulated pursuant to the recommendations of this Report. The handbook could, in the future, be part of a chapter in a comprehensive military manual on Israel's international humanitarian legal obligations and practices.

B. An Implementation Team

101. The Commission recommends that the Prime Minister should appoint an independent implementation team that will monitor the implementation of the recommendations in this Report and report periodically to the Prime Minister.

195 It should be noted that there are internal MAG Corps guidelines. The Commission was informed that work is being carried out to update the CMP guidelines, including the writing of a guideline related to operational incidents.

Summary of the Conclusions and Recommendations

In this Report the Commission reached the following recommendations and conclusions:

Recommendation No. 1: 'War Crimes' Legislation

1. The Ministry of Justice should initiate legislation for all international law offenses that do not have a corresponding domestic offense in Israeli criminal law.

2. Moreover, the Commission regards as important the specific inclusion of international 'war crimes' norms in Israeli domestic legislation. The accepted approach in the countries surveyed is to enshrine international criminal offenses in domestic legislation.

Recommendation No. 2: Responsibility of Military Commanders and Civilian Superiors

3. Legislation should be enacted to impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, where the former did not take all reasonable measures to prevent the commission of offenses or did not act to bring the matter to the attention of the competent authorities when they became aware of the offenses after the event.

Recommendation No. 3: Reporting Duties

4. The 2005 Reporting Procedure determined by the Chief of Staff, following an undertaking to the High Court of Justice, has not been implemented. The Reporting Procedure should be incorporated into the Supreme Command Orders and shall apply to every incident involving the

IDF or forces for which the IDF is responsible. The Reporting Procedure should be implemented and sanctions should be imposed on commanders who do not comply with it.

5. The Reporting Procedure should require documentation of the scene of an incident. This obligation includes seizing all exhibits and documents that may assist the examination and investigation, and storing the exhibits (such as clothing, ammunition or weapons) in conditions that will best preserve them for proper examination at a later date.

Recommendation No. 4: Grounds Giving Rise to an Obligation to Examine and Investigate

6. The Investigation Policy in the IDF, whereby a CID investigation is not begun immediately following the death of a person during combat operations unless there is a reasonable suspicion that an offense has been committed, is consistent with Israel's obligations under international law. However, this policy is not properly enshrined in Israeli law. It should therefore be enshrined in appropriate rules and guidelines.

7. In order to expedite the investigation of complaints, initial reports should be classified according to the legal framework of each incident, namely whether the incident occurred during combat operations and is therefore subject to the rules regulating hostilities, or whether it is it any other incident subject to law enforcement norms.

Recommendation No. 5: Fact–Finding Assessment

8. An operational debriefing is not designed for deciding whether to begin an investigation. A mechanism should be established for carrying out a fact–finding assessment, which should form the basis for the MAG's decision as to whether an investigation is necessary. For this purpose a

special team shall be established in the IDF with expertise in the theatres of military operations, international law and investigations. The function of the team will be to provide the MAG with as much information as possible, within a period of time stipulated in procedures, in order to enable the MAG to decide whether to begin an investigation.

9. The fact–finding assessment should include, insofar as possible, the questioning of complainants and additional witnesses that are not military personnel.

Recommendation No. 6: The Decision on Whether to Open an Investigation

10. Procedures should establish a timeframe of a few weeks during which the MAG decides whether to begin an investigation on the basis of the material in his possession.

11. The MAG's authority to order an investigation should not be made conditional upon consulting the commanding officer responsible for the unit involved in the incident, but the MAG should be allowed to consult any commander as he sees fit.

12. Every decision of the MAG not to open an investigation should state the reasons for the decision.

13. At the end of an examination process and at the end of a CID investigation, irrespective of the outcome, the MAG should consider referring the relevant material to the commanding officers.

Recommendation No. 7: Independence of the MAG

14. The fact that the MAG is subordinate to the authority of the Attorney–General in professional matters is consistent with the principle of independence as established in international law. However, legislation and organizational arrangements are required in order to safeguard this subordination (see below).

15. The MAG should be appointed by the Minister of Defense, upon the recommendation of a public professional committee. In order to institutionalize the professional subordination of the MAG to the Attorney–General, the latter should be the chairman or a member of the public committee.

16. The MAG's term of office should be fixed, like that of the Attorney–General, at one term of six years without any possibility of extension. The MAG should also be given a fixed rank.

Recommendation No. 8: The Military Advocate General's 'Dual Hat'

17. In order to prevent any appearance of partiality due to the MAG's dual hat – as head of the military prosecution and as the chief legal advisor to the military – the status and independence of the Chief Military Prosecutor (CMP) should be strengthened.

18. The CMP should be appointed by the Minister of Defense, upon the recommendation of a committee chaired by the MAG. The CMP's term of office and rank should be determined in advance.

Recommendation No. 9: CID Investigations

19. A Department for Operational Matters should be established in the CID to work with the MAG Corps for Operational Matters with bases in the areas where the incidents under investigation occur. The investigators should include persons that are fluent in Arabic.

Recommendation No. 10: Establishing the Investigation Timeframe

20. The MAG, in coordination with the Attorney–General, should set a maximum period of time between the decision to begin an investigation and the decision to adopt legal or disciplinary measures or to close the case. The MAG should publish, at least once a year, statistical data on the period of time taken to handle cases.

Recommendation No. 11: Transparency of Proceedings

21. The arrangements provided in the Rights of Victims of Crime Law, 5761–2001, relating to the receipt of information on criminal proceedings should also be applied, *mutatis mutandis*, to persons injured by law enforcement operations of the security forces that are investigated by the CID.

22. The MAG Corps should implement a strict documentation procedure for all examination and investigation actions carried out in a file and for all the decisions made, especially in cases involving investigations of alleged violations of international humanitarian law.

Recommendation No. 12: Oversight of the Legal Advice given by the MAG Corps

23. In order to strengthen the Attorney–General in exercising his

oversight powers over the legal advice given by the MAG, a unit specializing in international humanitarian law should be established in the Advice and Legislation Department at the Ministry of Justice.

Recommendation No. 13: Individual and Systemic Review of the Military Prosecution System

24. Legislation should provide a procedure to appeal decisions of the MAG to the Attorney–General. This legislation should determine the period of time for filing an appeal and for the Attorney–General to make a decision.

25. When the Complaints Commission for the civilian Prosecution is established, it should be authorized to review all the branches of the military prosecution, including monitoring the bodies of the IDF that conduct examinations and investigations, in order to ensure that the MAG's regulations and policy are being implemented de facto.

Recommendation No. 14: The Handling of Complaints against Police Officers

26. The examination and investigation of complaints against police officers operating under IDF command for violations of international humanitarian law in the West Bank should be carried out by the IDF, rather than by the Israel Police or by the Police Internal Investigation Department at the Ministry of Justice.

Recommendation No. 15: The Handling of Complaints against Israel Security Agency Interrogators

27. The role of the ISA Interrogatee Complaints Comptroller should be transferred from the ISA to the Police Internal Investigation Department at the Ministry of Justice.

28. All ISA interrogations shall be fully videotaped, in accordance with rules that will be determined by the Attorney–General in coordination with the head of the ISA.

Recommendation No. 16: The Handling of Complaints against Wardens

29. The head of the Investigations and Intelligence Department at the police should ensure that during investigators' training, proper emphasis is placed on the relevant rules of international law.

Recommendation No. 17: The Handling of Complaints against the Civilian Echelon

30. The system of investigating senior decision makers by commissions of inquiry and examination, which is well established in Israel, satisfies Israel's obligations under international law to investigate acts, decisions or omissions that give rise to a suspicion of serious violations of international humanitarian law.

Recommendation No. 18: Implementation of the Commission's Recommendations

31. The MAG should publish a comprehensive and updated handbook for the examination and investigation mechanisms in the IDF. The handbook should lay down guidelines for the examination and investigation mechanisms with regard to the handling of complaints and claims of violations of international humanitarian law. The MAG's guidelines should incorporate the guidelines and procedures that will be formulated pursuant to the recommendations of this Report. The handbook should be available to the public.

32. The Commission recommends that the Prime Minister should appoint an independent implementation team that will monitor the implementation of the recommendations in this Report and report periodically to the Prime Minister.

Chapter E: The Examination and Investigation of the Maritime Incident of 31 May 2010

Introduction

1. In the Government Resolution of 14 June 2010 to appoint the Commission (hereinafter: the Government resolution to appoint the Commission), the Commission was also asked to address the manner in which the mechanism to examine and investigate complaints and claims of violations of international humanitarian law generally practiced in Israel, was implemented with respect to the investigation of the maritime incident of 31 May 2010 – the same incident that the Commission examined in great detail in the Report it submitted to the Prime Minister on 23 January 2011 (hereinafter: the Commission's First Report).[1] In this chapter we will address this issue, i.e., the examination and investigation proceedings that took place following the events of 31 May 2010. In the first section of this chapter we will briefly summarize the events of the maritime incident of 31 May 2010 (hereinafter: the maritime incident). In the second section of this chapter we will survey the examination and investigation undertaken by the various Israeli mechanisms. In the third section of the chapter we will analyze a number of issues related to the examination and investigation mechanisms and the way in which they functioned in investigating the maritime incident, taking into consideration the principles of international law, as analyzed in this Report. This analysis will also illustrate the importance of the recommendations formulated by the Commission in chapter D, and will demonstrate how the implementation of the recommendations will improve and optimize the IDF's examination and investigation mechanisms.

1 Resolution No. 1796 of the 32nd Government, *Appointment of an Independent Public Commission, Chaired by Supreme Court Justice (ret.) Jacob Turkel, to Examine the Maritime Incident of 31 May 2010* (Jun. 6, 2010), para. 5 [hereinafter: *the Government resolution to appoint the Commission*].

A. The Maritime Incident of 31 May 2010 – A Brief Summary[2]

2. On 31 May 2010, a flotilla of six ships whose stated destination was the Gaza Strip approached the Israeli coast. The six flotilla ships departed from the ports of Ireland, Turkey and Greece, and they joined at a meeting point approximately 30 miles south of Cyprus.[3] The largest of the ships was the *Mavi Marmara*, which departed from the port of Istanbul but picked up most of its passengers at the port of Antalya. On board the ship were approximately 590 passengers and crew members, who were primarily of Turkish nationality.

3. When the flotilla neared the Israeli coast, a number of warnings were transmitted to the ships. At 4:26 a.m., after the ships reached a distance of approximately 70 miles from the coast of Atlit and after they did not respond to the warnings, a military operation was launched. The goal of the operation was to take control of the ships. The rules of engagement that were given to the forces (hereinafter: the Rules of Engagement) reflected a use of force similar to that which is applied in a law enforcement operation.[4]

4. On the deck of the *Mavi Marmara*, the IDF soldiers confronted extreme violence. Two soldiers were wounded by gunfire, three soldiers

2 For a comprehensive survey of the events and relevant documentation, see: *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission* Report Part One, at para. 113–160 (2011) [hereinafter: The Commission's First Report].

3 As discussed in The Commission's First Report, *supra* note 2, eight vessels departed with the purpose of joining up and reaching Gaza together. Two of the vessels were delayed along the way for various reasons and it was decided not to wait for them. One of the vessels, the CHALLENGER 2, did not take part in the flotilla due to a technical malfunction and some of its passengers transferred to the deck of the *Mavi Marmara*, see *IDF Supplementary Response to the Commission's Questions of 15 November 2010*, para. A [hereinafter: *IDF Supplementary Response to the Commission's Questions, Nov. 15, 2010*]. The second vessel, the Rachel Corrie, tried to reach the Gaza Strip at a later stage, after the events of the flotilla in question. This ship reached Israel's shores on 5 June 2010, and after it was stopped by the IDF, its cargo was unloaded at the Ashdod port and the merchandise on board was transferred to Gaza, after inspection, through the land border crossings. See: Resolution No. 1759 of the 32nd Government, *Handling of the Rachel Corrie Flotilla to Gaza* (Jun. 6, 2010); see also: Transcript of session no. 4, "Testimony of the IDF Chief of Staff" (Aug. 11, 2010).

4 For a detailed analysis of the Rules of Engagement given to the armed forces involved in the *Winds of Heaven 7* operation, see: The Commission's First Report, *supra* note 2, at paras. 204–211.

were taken to the hold of the ship after they had been wounded, and others suffered serious injuries. The IDF soldiers responded with physical force, shooting from both less–lethal and lethal weapons. As a result of these events, nine of the flotilla participants were killed, approximately 55 of them were wounded, and nine IDF soldiers were wounded.

Aboard the other ships, the IDF soldiers encountered less or no resistance, and there was no loss of life.

5. After the takeover of the ships was completed, the wounded were evacuated to various hospitals. The bodies of the dead were cared for, and they were ultimately transferred to Turkey, at Turkey's request, after only an external examination was conducted at the Abu Kabir Forensic Institute. The ships and the remaining flotilla participants were taken to the port of Ashdod. In Ashdod, the flotilla participants underwent a medical examination and a security check and they were also issued a detention order (in the language of each of the flotilla participants). Some of them were required to provide biometric measurements (the taking of fingerprints and a photograph). Subsequently, the flotilla participants were transferred to detention facilities. On 2 June 2010, the participants were taken to Ben–Gurion Airport and flown to the countries from which they embarked on the flotilla.

6. After the maritime incident, there were demands both in Israel and internationally that Israel investigate the incident immediately. Already the next day, the UN Secretary–General expressed the need for a full investigation to examine the incident.[5] Shortly thereafter, an urgent meeting of the UN Security Council was held on this issue, resulting in a call for a prompt, impartial, credible and transparent investigation conforming

5 See: Statement by the President of the Security Council, UN Doc. S/PRST/2010/9 (Jun. 1, 2010) [hereinafter: *UN Security Council, Jun. 1, 2010*].

to international standards.[6] This call led, *inter alia*, to the establishment of two international committees of inquiry: on 2 June 2010, the UN Human Rights Council, which was holding its 14th session at the time the events of the flotilla occurred, announced the establishment of a Fact–Finding Mission;[7] on 2 August 2010, the UN Secretary–General announced the formation of a UN review panel, headed by the former Prime Minister of New Zealand, Sir Geoffrey Palmer, with participation of the former President of Colombia, Mr. Alvaro Uribe, an Israeli representative (Mr. Joseph Ciechanover), and a Turkish representative (Mr. Özdem Sanberk).[8]

6 *Id.*; Note that this statement is not a decision of the Security Council under Articles 25 and 27 of the UN Charter, and thus is not binding.

7 See: The Human Rights Council, *Report of the International Fact–Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting From the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, UN Doc. A/HRC/15/21 (Sep. 27, 2010); *The Grave Attack by Israeli Forces Against the Humanitarian Boat Convoy*, G.A. Res. 14/1, UN Doc. A/HRC/RES/14/1 (Jun. 23, 2010).

8 See: Geoffrey Palmer, *Report of the Secretary–General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, delivered to the Secretary–General* (Sep. 3, 2010).

B. Description of the Examination and Investigation Proceedings Conducted in Israel

The Israeli Police Investigation into Offenses Committed by Flotilla Participants

7. Pursuant to the instruction of the Israeli Attorney–General on 31 May 2010, the Israel Police began an investigation focusing on suspicions of offenses involving the use of violence by the flotilla participants against the IDF soldiers who took control of the vessels as well as of other offenses.[9] It should be emphasized that the Police were not requested to examine complaints or allegations regarding violations of international humanitarian law by IDF soldiers, but rather only offenses that were committed by the flotilla participants against IDF soldiers.[10]

8. Within the framework of this investigation, attempts were made to identify the attackers by showing their photographs to the wounded soldiers. The police also seized evidence, including various types of

9 Ministry of Justice, *Decision of the Attorney–General to close the investigation file that was opened with respect to the suspicion of commission of offenses by the Israeli civilians who participated in the flotilla to Gaza on 31 May 2010 (Dec. 22, 2011*) [hereinafter: *Attorney–General's Decision to Close the Investigation File of the Flotilla's Israeli Participants*].

10 See: letter from Brigadier–General Varda Shaham, head of the Investigations Division of the Israel Police, to Hoshea Gottlieb, the Commission's coordinator, *Request of the Public Commission to Receive Materials Collected During the Police Investigation* (Sep. 12, 2010) [hereinafter: *Police Response – Receipt of the Police Investigation Materials*]. The Police Response stated that 'the investigation was opened pursuant to the Attorney–General's instruction, and was conducted pursuant to his instructions, as received from time to time [...]. In accordance with those instructions, the Israeli police opened an investigation on 31 May 2010, into the suspicions concerning the commission of offenses against the soldiers on the *Mavi Marmara*, including the grave attack on the soldiers, disturbing the peace, endangering the lives of soldiers, seizing their weapons, and so forth (hereinafter: the Violent Offenses)'. It continued: 'The police were instructed, first, to conduct an investigation only with respect to the Israeli and foreign passengers against whom there was a concrete evidentiary foundation for the commission of violent offenses against the soldiers, and not with respect to all of the passengers. In addition, with respect to the Israelis, an instruction was given that they would also be investigated for any other offense as to which an evidentiary foundation would materialize, including the suspicion of an attempt to enter the Gaza Strip contrary to orders of the Implementation of the Disengagement Plan Law, 5765–2005. [...] and approval was also given for the investigators to board the vessel to collect relevant evidence. Subsequently, the police were also instructed to investigate all of the Israelis on suspicion of participating in the commission of the various violent offenses against the soldiers, and later the instruction was broadened to require the police to also investigate all of the wounded foreign passengers on suspicion of cooperation in commission of the violent offenses'.

ammunition, samples of material suspected to be blood, pipe wrenches, knives and bars covered with what was suspected to be blood, two bullets and a Nokia mobile phone.[11]

9. The Police investigation with respect to the foreign suspects (i.e., the flotilla participants who were not Israeli citizens) was halted after a short time. As discussed above, in a presidential statement issued on 1 June 2010, the UN Security Council called for the release of the vessels and the detainees, as well as for the return of the corpses of the deceased to Turkey.[12] On the same day, the Israeli Ministers' Committee for National Security Matters met and recommended, for political reasons, to release all of the flotilla participants and not to take legal measures against them.[13] The Attorney–General adopted this position, and on 2 June 2010, he issued a written order to immediately deport 'the foreigners who arrived on the flotilla who are suspected of committing criminal offenses' in consideration of the recommendation of the political echelon which was based on public, political and security interests, and on the grounds that 'the continuation of the detention of these individuals in Israel will cause more harm than benefit to the essential interests of the State'.[14] Three petitions were submitted to the Supreme Court against this decision of the Attorney–General and were rejected.[15] The Supreme Court held that there were no grounds to intervene in the Attorney–General's decision, because it was within the realm of his discretion, and that intervention in his discretion in decisions pertaining to investigations or prosecutions is limited to

11 *Id.*, at para. 9; The Division of Investigations and Intelligence – Lachish District, *Summary of the Turkish Flotilla Investigation, Computer File No. 207206/10* (Aug. 2, 2010).

12 See: *UN Security Council, Jun. 1, 2010, supra* note 5: 'The Security Council requests the immediate release of the ships as well as the civilians held by Israel. The Council urges Israel to permit full consular access, to allow the countries concerned to retrieve their deceased and wounded immediately'.

13 Decision no. IS/39 of the Ministerial Committee for National Security Matters, *Israel's Policies Toward Gaza (Military and Civilian)* (Jun. 1, 2010).

14 See: Decision of the Attorney–General of 2 June 2010, submitted in the context of HCJ 4221/10 *Ben Yaakov v. Israel Police* (unpublished, Jun. 2, 2010) [hereinafter: *Decision of the Attorney–General Concerning Release of the Flotilla Participants*].

15 See: HCJ 4169/10, 4193/10, 4220/10, 4221/10, 4240/10, 4243/10, *Cohen v. Minister of Defense* (unpublished, Jun. 2, 2010), in which the three petitions, which sought to prevent the release of the foreigners, were rejected.

exceptional and unusual instances. The Court also stated that due to the unusual nature of the maritime incident and the political aspects involved, the Attorney–General was entitled to take into consideration those political aspects.[16]

Following the Attorney–General's decision, 'the police engaged in a concerted effort in order to locate the suspects among the foreigners', and according to the police investigators, an evidentiary basis was found for suspicions against 11 of the foreigners.[17] A short time before their deportation from Israel, these suspects were questioned under warning,[18] but following a meeting held on 7 July 2010, the Attorney–General instructed the police not to continue the investigation concerning the offenses attributed to the suspects. However, he instructed them to complete the investigations concerning the Israeli nationals who were suspected of committing the offense of attempting to enter Gaza illegally, and to submit the investigative material to him along with their recommendations.[19] Despite the recommendations of the Investigations and Intelligence Division of the Police that there is an evidentiary basis for the commission of offenses by the Israeli flotilla participants, and that there is a public interest in prosecuting them, the Attorney–General notified the Government on 22 December 2011 that the file was to be closed. The Attorney–General based his decision on the significant evidentiary and legal difficulties in proving the elements of the offense and on the application of Israel's criminal law to crimes committed outside the country's borders.[20]

16 *Id.*, at para. 7.

17 *Police Response – Receipt of the Police Investigation Materials*, *supra* note 10, at para. 6.

18 *Id.*, at para. 7.

19 See: *Decision of the Attorney–General Concerning Release of the Flotilla Participants*, *supra* note 14; See also: *Police Response – Receipt of the Police Investigation Materials*, *supra* note 10, at para. 8.

20 *Attorney–General's Decision to Close the Investigation File of the Flotilla's Israeli Participants*, *supra* note 9.

It should be noted that, pursuant to the Turkel Commission's request, the police investigation materials were submitted to the Commission in September 2010.

The Examinations Conducted by the IDF

1. General Staff Experts Debrief

10. On 7 June 2010, approximately one week after the maritime incident, the Chief of Staff, upon the recommendation of the Military Advocate–General (hereinafter: the MAG), appointed Major–General (ret.) Giora Eiland to head a General Staff team of experts which would examine the incident (hereinafter: the Eiland Team) by means of an 'experts debrief'.[21] The Eiland Team was instructed to examine the preparations for the operation, the operational method that was chosen for the operation and the possible alternatives, the preliminary arrangements, and the mode of implementation. The actions of Shayetet 13 (the IDF unit that took over the vessels) in the maritime incident were also examined. This examination was coordinated by Colonel Rafi Milo, who met with officers and soldiers of Shayetet 13 that participated in the maritime incident, and composed a detailed picture of the events that occurred. The Eiland Team tabled their conclusions on 11 July 2010 (hereinafter: the Eiland Report). The Eiland Team noted the deficiencies in a number of areas and provided operational recommendations to the Chief of Staff.

In addition to the experts debrief by the Eiland Team, the IDF conducted additional internal operational debriefs within the units that took part in the maritime incident, including a debriefing by the Navy, a debriefing by the head of Israel Military Intelligence, and a debriefing by the head of the

21 For an explanation of this term and the distinctions between the types of operational debriefs, see: Chapter C, paras. 88–91.

Operations Division. These reports were submitted to the Turkel Commission.[22]

2. The MAG's Decision

11. After the incident, the MAG decided not to conduct an immediate investigation by the Military Police Criminal Investigations Division (hereinafter: the CID) into the deaths of the nine civilians who were killed during the takeover of the *Mavi Marmara* and the wounding of 55 of the flotilla participants. The MAG stated that the deaths and the wounding of civilians during the IDF takeover of the *Mavi Marmara* 'constitute – in many respects – a unique "interim situation" with respect to the issue of the manner in which the investigation policy is implemented'.[23] On the one hand, the forces that carried out the takeover operation were instructed to refrain, as far as possible, from the use of lethal weapons, and were even equipped with less–lethal weapons. In other words, the death of a civilian, and certainly nine civilians, was unexpected and was considered an exceptional event. On the other hand, upon commencement of the takeover, it became clear that the situation was not as expected, and that the forces that landed aboard the *Mavi Marmara* encountered a planned ambush by violent activists who were organized and armed, such that the forces faced a real and immediate threat to their lives.[24] The MAG elaborated the considerations he took into account for the decision of whether to open an immediate CID investigation. One such consideration was that the incident was being investigated by the Israel Police (with respect to offenses allegedly committed by flotilla participants), which ensured the preservation of the physical evidence found on the vessels. He also took into account the fact that the incident was being examined by a Chief of Staff team of experts headed by Major–General (ret.) Giora Eiland. The MAG also pointed out that an examination by means of an operational debrief is

22 See: The Commission's First Report, *supra* note 2, at para. 10.

23 *Military Advocate–General Position Paper* 82 (Dec. 19, 2010) [hereinafter: *MAG Position Paper 2010*].

24 *Id.*

the most expeditious way to obtain a complete factual picture, and that such a debriefing does not prevent conducting a criminal investigation if the debriefing findings raise suspicions that illegal activity occurred.[25]

12. The MAG stated that, alongside his aforementioned decision, complaints and claims based on concrete information regarding theft of property that was aboard the ships, were investigated by the CID in accordance with the investigation policy. In this context, criminal investigations were commenced with respect to 18 soldiers who had participated in the search of the *Mavi Marmara* after it anchored in the Ashdod port.[26] Criminal indictments were filed against eight soldiers and disciplinary actions were taken against five soldiers.[27]

Establishment of a Public Commission of Inquiry (the Turkel Commission)

13. As noted above, on 14 June 2010, the Government of Israel resolved to establish the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission). The resolution provided, *inter alia*, that with regard to the examination of the military operations that Israel undertook to enforce the naval blockade on 31 May 2010, the Commission 'will receive for its review the documents it requires and will also be able to request from the head of the Expert Military Investigative Team appointed by the IDF Chief of Staff to transfer for its review the summary findings of the operational investigations carried out following the incident' (i.e., the Eiland Report).[28]

14. The Commission heard 26 testimonies, and also received a great

25 *Id.*, at 83.

26 *Id.*, at 83–84.

27 See: Letter from Major Roni Katzir, MAG Corps, to Hoshea Gottlieb, the Commission's coordinator, *Investigation Data Regarding the Marmara Events* (Aug. 13, 2012).

28 *The Government resolution to appoint the Commission*, *supra* note 1, at para. 6(c).

deal of additional material from a number of authorities, comprising over 150 exhibit files, which included various synopses of issues relating to its work (some of which were prepared at the Commission's request); transcripts of meetings held at various governmental levels; summaries of work meetings of various parties; internal–organizational investigations; documentation of objects and documents that were seized on the *Mavi Marmara*, material that was seized from computers on the *Mavi Marmara*; and medical documents and medical certificates (including documents that were received from Magen David Adom, documents that were received from the Abu Kabir Forensic Institute, and documents that were received from hospitals where the injured were hospitalized and treated).[29]

15. As stated in the Commission's First Report, the Commission exercised its authority (granted in its terms of reference) to request that the military operational debriefs be deepened and more extensive.[30] Military personnel were appointed for this purpose, and they conducted new operational debriefs in accordance with the detailed instructions of the Commission's representative. In the framework of these new debriefs, documented testimonies were taken from 38 combat personnel and other military personnel who were directly involved in the events, and the Commission received extensive additional material documenting all aspects of the maritime incident.[31]Additional supplementary debriefs were conducted, during which written testimonies were taken from another 20 combat personnel, and 23 combat and other military personnel provided testimonies a second time.[32] These debriefs enabled the Commission to

29 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 10.

30 *The Government resolution to appoint the Commission*, *supra* note 1, at para. 6(c); It should be noted that, in the context of HCJ 4641/10 *Uri Avneri v. Prime Minister* (unpublished, Jul. 12, 2010), a statement agreed upon by the parties was submitted to the Court providing that, if the Turkel Commission shall request to *subpoena* soldiers to testify before it and the Government does not permit the soldiers to tetify, then the Court will deal with the matter. In practice, the Commission did not find it necessary to *subpoena* soldiers, other than the Chief of Staff, who was *subpoenaed* to testify before the Commission twice.

31 See: *Deepening and Broadening the General Staff's Experts Debrief* (Sep. 20, 2010) [hereinafter: *Debrief Expansion*, *Sep. 20, 2010*].

32 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 9; Altogether, the Commission approached the IDF six times, in addition to the *Debrief Expansion*, *Sep. 20, 2010*, *supra* note 31, with requests

examine each use of force that was reported by the IDF soldiers in their testimonies (with certain limitations, which shall be addressed below).[33]

16. The Commission also invited relevant Turkish parties to testify by means of the Turkish Embassy in Israel. In addition, British citizens who had expressed interest in submitting evidence to the Commission were invited to furnish synopses of the matters they wished to present to the Commission. The Commission also offered to hear these testimonies by means of a video–conference. None of these invitations received a response.

17. On 23 January 2011, the Commission submitted its first report. The Commission's main conclusions were that (i) considering the security circumstances and Israel's efforts to fulfill its humanitarian obligations, imposition of the naval blockade on the Gaza Strip was lawful and complied with international humanitarian law; and (ii) despite the regrettable consequences of the actions Israel undertook, on 31 May 2010, to enforce the naval blockade, the actions were lawful and complied with international law. On this issue, the Commission examined 133 incidents in which there was a use of force by IDF soldiers (including the use of firearms, less–lethal weapons, shooting as a deterrent, threatening with a weapon, use of a Taser, and in certain circumstances the use of physical force), that was described by the soldiers or depicted on electronic media. These examinations were elaborated in the First Report's confidential annex.[34] With respect to 127 of these incidents, it was determined that the use of force was in conformity with international law. With respect to six incidents in which force was used, the Commission concluded that it

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to supplement the information that it had obtained (see: *IDF Supplementary Response to the Commission's Questions of 7 November 2010*; *IDF Supplementary Response to the Commission's Questions, Nov. 15, 2010*, *supra* note 3; *IDF Supplementary Response to the Commission's Questions of 29 November 2010*; *IDF Supplementary Response to the Commission's Questions of 7 December 2010*; *IDF Supplementary Response to the Commission's Questions of 8 December 2010* [hereinafter: *IDF Supplementary Response to the Commission's Questions, Dec. 8, 2010*]; *IDF Supplementary Response to the Commission's Questions of 30 December 2010*).

33 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at paras. 232–238.

34 *Id.*, at para. 239(a).

did not possess sufficient information to be able to make a determination regarding the legality of the use of force. Three of these six incidents involved the use of firearms; two of these incidents involved the use of physical force (kicking); and in one incident a participant was struck with the butt of a paintball gun.[35]

Internal Examinations by Other Authorities

18. Internal debriefs were also conducted by other authorities involved in the maritime incident, such as the Israeli Prison Service, the Foreign Ministry, and the Population and Immigration Authority of the Ministry of the Interior. These internal debriefs were submitted to the Turkel Commission.

The State Comptroller's Probe

19. On 15 June 2010, the State Comptroller notified the Knesset (by means of the chair of the Knesset's State Control Committee) of his decision to examine certain procedures related to the government's decisions making processes, intelligence matters, and the handling Israel's public relations. The State Comptroller stated that the probe of these subjects would be carried out, *inter alia*, 'in the framework of conducting follow–up reports of prior probes conducted in relation to these subjects, and in particular during the period after the Second Lebanon War'. He also stated that the investigation would not address 'the operational activity of the forces being investigated internally by the IDF [by the Eiland Team], [and] the legal issues to be addressed by the committee established by the Government, with international participation [the Turkel Commission]'. On 4 and 5

35 *Id.*, at para. 239(c).

August 2010, the State Comptroller also furnished this notification to the Prime Minister and the relevant ministers.

20. On 16 June 2011, the State Comptroller distributed a summary of his findings (the draft report) to the relevant parties. The report, which addressed the implementation of the National Security Council Law, 5768–2008, and the handling of the Turkish flotilla, was published on 12 June 2012. The State Comptroller focused on the decision–making process within the Government with respect to its handling of the maritime incident and the interaction that took place between the political echelon and the IDF; intelligence matters; and the work of the public relations authorities.[36]

21. The State Comptroller found that there were significant deficiencies in the decision–making process regarding the maritime incident, including that the process was conducted without any organized, coordinated, and documented staff–work. The Comptroller also found deficiencies in the national public relations apparatus and its functioning with respect to the maritime incident.

Supplementary Investigations Conducted by the MAG Following the Conclusions of the Various Commissions of Inquiry

22. After the submission of the Commission's First Report and as a consequence of the Report's conclusions, particularly with respect to the six incidents discussed above, the MAG instructed the Navy to extend the

36 See: State Comptroller, *Inspection Report on Implementation of the National Security Council Law and the Handling of the Turkish Flotilla* (2012).

operational debrief of those incidents.[37] Based upon the findings of this extended debrief, the MAG decided that legal measures were not warranted.

23. On 4 April 2012, the MAG submitted an opinion to the Commission regarding two additional incidents which, according to the MAG, 'were presented in the Palmer Report [the UN Review Panel] as having a concrete evidentiary foundation, which expands upon the analysis of these incidents in the Turkel Report'.[38] The MAG had requested 'a more thorough examination with respect to these two incidents' and, after that examination, he decided that legal measures were not warranted.

37 See: the MAG Corps for Operational Matters, *Examination of the Six Specific Incidents Mentioned in the Confidential Annex to the Report of the Turkel Commission on the Examination of the Flotilla Incident* (Jun. 29, 2011) [hereinafter: *Examination of the Six Incidents in Light of the Commission's Conclusions*, *Jun. 29, 2011*]; See especially at 2: 'The Navy was requested to conduct a supplement debriefing of all parties who witnessed the events or who may have taken part in them, with an emphasis on the issues as to which the [Turkel] Commission did not find an answer in the information that had been provided to it'.

38 The MAG Corps for Operational Matters, *Supplemental Recommendation to the Military Advocate–General Following the Findings of the Palmer Committee Report on the Examination of the Flotilla Incident* (Feb. 16, 2012).

C. Evaluation of the Examinations and Investigations That Were Conducted

24. As noted above, in the Government resolution to appoint the Commission, the Commission was asked to address the manner in which the mechanism to examine and investigate complaints and claims of violations of international humanitarian law generally practiced in Israel was implemented with respect to the investigation of the maritime incident. The Commission decided to focus on particular aspects concerning the manner in which the use of force in the maritime incident was examined and investigated by the IDF.

25. First we will discuss the issues that were examined and investigated following the maritime incident ('what to investigate?'). Second, we will assess the MAG's decision not to open an immediate CID investigation into the deaths and injuries of the activists on the flotilla following the maritime incident. Additionally we will discuss the documentation of the scene and its consequences ('when to investigate?'). Finally, we will comment on the use of the Eiland Report as a 'fact–finding assessment' with respect to the question of whether it was necessary to investigate the use of force by IDF soldiers in the maritime incident and we will also discuss the measures undertaken by the MAG after the submission of the Turkel and Palmer reports ('how to investigate?').

What to Investigate?

26. As stated in the Commission's First Report, some of the flotilla participants were investigated by the Israel Police[39] and some by Military

39 Altogether, 42 participants in the flotilla were interrogated by the Police. All of them were notified of their right to consult with an attorney, and the questions were translated for all of them (other than the Israeli citizens, who did not require translation). The overwhelming majority of the participants refused to sign the statements that were taken, a considerable portion of them refused to respond to the questions, and of those who provided some version, it was laconic, and it was not possible to

Intelligence.[40] However, the method in which force was employed by the IDF in the maritime incident could not be examined based on the versions of the events provided by the flotilla participants because the investigations did not address this issue. The IDF soldiers who were investigated by the Israel Police immediately after the incident were also asked primarily about the force employed against them, and not about the force they used. This is understandable given that the Attorney–General instructed that the investigations should focus on the actions of the flotilla participants.

27. The Commission's view is that when the criminal investigation of the incident commenced, and statements were taken from the flotilla participants and the soldiers who participated in the maritime incident, it would have been appropriate to take statements from the soldiers concerning the use of force on their part as well. In this context it should be recalled that the MAG's decision at that stage, with respect to the soldiers' use of force, was that 'the necessity of a criminal investigation will be assessed after the completion of the debriefing' and based, *inter alia*, on the materials collected from the police investigation.[41]

28. We note that at every stage of the legal treatment of this matter, there appeared to be a significant absence of a central body to coordinate the assessment of the security force's activities from an international legal perspective. As discussed in Chapter D, the Commission recommends the establishment of a unit in the Ministry of Justice that will specialize in international humanitarian law and centralize all legal treatment of issues such as those arising in this matter.

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derive from their statements a clear description of the employment of force by the IDF soldiers and its circumstances.

40 Altogether, 86 participants in the flotilla were interrogated by Military Intelligence. A review of the investigation reports indicates that only a small number of those interrogated referred to the use of force by the IDF soldiers. Most of the interrogatees did not refer to the events in a manner that enables a legal analysis of the legality of the use of force.

41 *MAG Position Paper 2010*, *supra* note 23, at 83.

When to Investigate?

1. The MAG's Decision Not to Open an Immediate CID Investigation After the Maritime Incident

29. As described above, the takeover of the *Mavi Marmara* resulted in the death of nine and the wounding of 55 flotilla participants. Did these consequences in and of themselves oblige the MAG to open an immediate CID investigation? As stated in the Commission's First Report, the legal basis for the enforcement of the naval blockade is international humanitarian law, and, therefore, the rules that governed the use of force during the takeover of the *Mavi Marmara* were international humanitarian law. Indeed, the paradigm guiding the IDF forces, as well as their preparation for the operation, was that of law enforcement and, therefore, the Rules of Engagement that were given to them conformed to this paradigm and its principles governing the use of force, i.e., self–defense. However, when the takeover of the vessel commenced, it quickly became apparent that this was not an ordinary law enforcement situation but rather a planned ambush by violent, organized and armed activists, i.e., an exchange of military hostilities.

30. As described in Chapter A of this Report, international humanitarian law imposes an obligation to investigate whenever there is a credible accusation or a reasonable suspicion that a war crime has been committed. However, if the information is partial or circumstantial and insufficient to establish a reasonable suspicion requiring an investigation, then a fact–finding assessment must be conducted in order to clarify whether there is a need to investigate.[42] The existence of a reasonable suspicion concerning the commission of a war crime depends on both the facts of the incident and the legal framework, i.e., whether the incident is governed by the law regulating the conduct of hostilities or law enforcement.

42 See: Chapter A, para. 49.

In the case at hand, the IDF forces were given Rules of Engagement suited to law enforcement activity. In any law enforcement operation involving the death of a person, not to mention any such operation which results in the death of nine people, an investigation must be opened. However, as noted, it became clear that the situation was in fact different from that which was expected. The exchange of hostilities altered the legal character of the operation and the consequent applicable legal framework became the law regulating the conduct of hostilities. Accordingly, when the circumstances do not raise a *prima facie* reasonable suspicion that a crime has been committed, a 'fact–finding assessment' should be conducted to serve as the basis for a subsequent decision about whether to open an investigation.

Therefore, the Commission finds that the data available to the MAG (see above in paragraph 11) justified his decision not to initiate an immediate CID investigation.

31. It should be noted, that in some of the countries surveyed in Chapter B there are rules providing that, as a matter of policy, an investigation must be opened concerning incidents liable to arouse widespread public criticism, or to raise a public or media outcry (without first conducting a fact–finding assessment). Thus, for example, in Canada a rule was issued in response to actions of the Canadian forces in Afghanistan (Joint Task Force Afghanistan Standing Order 304 (Serious Incident Reporting)), according to which 'any significant incident be reported immediately' (including 'actions by CF [Canadian Force] members that may undermine public values, or lead to the discredit of Canada at home or abroad').[43] A similar order was issued in 2006 by the deputy commander of the American forces in Iraq, requiring the investigation of 'any use of force against Iraqis that resulted in death, injury, or property damage greater than $10,000'.[44]

43 See Annex C: *The Canadian Report*, at para. 117.

44 See Annex C: *The US Report*, at para. 108.

The Commission views these approaches favorably, and it recommends that the MAG consider ordering the opening of a CID investigation, *as a matter of policy*, with respect to such incidents even in the context of hostilities, especially when the damage was not foreseen.

2. Documentation of the Scene

32. As discussed in the previous chapters, the reporting duties imposed on units involved in an operation include the obligation to document the scene of the incident. The immediate documentation of a scene after an incident assists the examination and investigation authorities in understanding the incident and in analyzing whether there are grounds for opening an investigation.

33. As stated in the Commission's First Report, at the time the Commission formed its conclusions regarding the maritime incident, the evidence consisted primarily of the documented testimonies of over 40 soldiers and commanders taken during the IDF debriefings.[45] As noted, the Commission requested additional information to supplement these debriefings and then cross–referenced and verified these testimonies against other relevant testimonies, and compared them to other materials submitted to the Commission. Generally, the Commission found that the soldiers' accounts were credible and trustworthy. However, the Commission found that its ability to construct a complete picture of the incidents was limited because, *inter alia*, the scene in which the events took place had not been kept 'sterile' between the time the events occurred until the investigation commenced. Thus the Commission's First Report stated that: '[s]ome of the bodies of those who were killed were moved from the places where they had been shot, the bullets and shells found on the *Mavi Marmara* were not collected in an organized manner, the various assault weapons used by the IHH activists (knives, clubs, slingshots, etc.) were

45 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 236.

gathered in one location and not documented as they were apprehended, etc.'.[46]

34. It is important to note, as was also discussed in the Commission's First Report, that a considerable amount of electronic media material was collected from the incident, including videos and photographs from digital cameras and video recorders that were used by the flotilla participants, videos from the CCTV aboard the *Mavi Marmara*, and videos and recordings from the IDF's recording devices. This material, of course, constitutes objective evidence which is highly reliable, and which must be preserved and documented in an organized manner.

35. Nevertheless, it became apparent during the Commission's work that the electronic media was not properly preserved nor documented in an organized manner. Due to the great significance that the Commission attributed to the electronic media, the Commission asked to receive all of the electronic media material that was collected from the maritime incident. Altogether, more than 900 hours of video material was received and great efforts were devoted towards viewing and listening to the recordings. However, it appeared to the Commission as though various events that should have been documented were not. Therefore, the Commission again asked the IDF to ascertain whether all of the electronic media that was collected had been furnished to the Commission.[47] In response to these requests, a number of additional film clips that were not previously in the Commission's possession were provided to it. It should be further noted that some of the films handed to the Commission were edited. For example,

46 *Id.*, at para. 237.

47 See, for example: *IDF Supplementary Response to the Commission's Questions, Dec. 8, 2010*, *supra* note 32, at 2, para. 6. One issue of concern to the Commission was the fact that three of the soldiers who were abducted and taken below the deck of the ship stated in their testimonies that a 'press conference' took place around them below deck, i.e., that the activists who were below deck tried to photograph them with all of the means they had available, including cellular phones, regular cameras, and video recorders. However, in the hundreds of hours of recordings that were furnished to the Commission, and which also included material photographed by flotilla participants, no evidence of this was found.

in some films a computer cursor pointed out certain details of the events. The Commission discussed this in the First Report and, as noted, stated that this limited the Commission's ability to make use of the electronic media.[48]

36. Clearly, assimilation of reporting procedures and meticulous preparation of all aspects of the preliminary report,[49] especially the preservation and documentation of the scene, would have assisted the various examinations and investigations including the work of the Commission, and it would have contributed to a better understanding of the events. It is important to reiterate that precision in the immediate documentation of a scene upon conclusion of events by the operational unit or by other appropriate authorities contributes significantly to an 'effective investigation'.[50]

With respect to the electronic media, the videos that were provided to the Commission at later stages supported the versions of the IDF soldiers. However, and particularly at a time when the battle is also being waged in the legal and media spheres, it is essential to establish an organized system for the documentation and classification of electronic materials, such as electronic media, which can be used to understand the incident and to ensure that investigative bodies receive all of the available information. The formulation of suitable and written procedures, their assimilation and their enforcement, are an important part of the IDF's preparation for the proper enforcement of international law.

48 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 237.

49 See: Chapter C, paras. 72–73; Chapter D, para. 21.

50 See: Chapter D, para. 24.

How to Investigate?

1. The Eiland Report as a 'Fact–finding Assessment' Preceding the Decision on Whether to Open an Investigation

37. As discussed above, the MAG's decision not to open an investigation immediately was based primarily on the fact that the incident was being examined simultaneously by the General Staff team of experts headed by Major–General (ret.) Giora Eiland, which was, in the MAG's opinion, the most expeditious way to obtain a complete factual picture.

38. As noted, the Eiland Report was submitted in July 2010. The Report was divided into ten chapters, which were prepared by the various members of the investigation team based on their area of expertise. The part of the Report relating to the issues addressed here is the chapter dealing with the actions of the Shayetet 13 Unit during the maritime incident. This chapter surveys the preparations and the takeover of the *Mavi Marmara* while describing the events minute by minute. The chapter details the attempts to board the *Mavi Marmara* from the Israeli navy Morena speedboats, the fast–roping from the three helicopters, the soldiers' (who fast–roped down from the first helicopter) descriptions of the violence directed against them, their injuries, their use of force in response to the violence, the boarding from the Morena speedboats, the evacuation of the wounded, and the search of the vessel. The chapter also makes a certain attempt to determine the circumstances in which the nine flotilla participants were killed.[51]

39. Indeed, the Eiland Team was composed of experts in their fields – senior commanders who were not involved in the planning or command of the operation. In comparison with other operational debriefs, the Eiland Team's debriefing was conducted thoroughly and in a short period of time, and presumably the detailed examination of the circumstances in which

51 See: *Winds of Heaven 7* 106–107 (General Staff Experts debrief of Giora Eiland, Jul. 11, 2010).

the activists were killed will ensure that important operational lessons will be drawn for the future.

However, as stated in Chapter C, the operational debrief is not a legal tool but rather an operational tool, intended for use by commanders and not lawyers. On this point the Commission emphasizes that, despite the thoroughness of the Eiland Report, it does not provide an answer to the legal questions which arise with respect to the overall circumstances of the use of force by the IDF soldiers. Thus, for example, the Eiland Report does not examine the circumstances in which 55 flotilla participants were injured.[52] As the Commission indicated in its First Report, in order to draw conclusions about the legality of the use of force in the maritime incident, the Commission had to collect detailed testimonies from all of the soldiers who had participated in the incident. The MAG also expressed the view that it would have been impossible to make a decision on whether to initiate an investigation based on the Eiland Report and that without the Turkel Report he too would have needed the operational debrief to be expanded.[53] This is understandable in light of the fact that the primary purpose of an operational debrief is to draw operational lessons, and not to be used as a tool for a legal assessment.

Ultimately, the MAG relied on the Turkel Commission's examination in making the decision on the necessity (or lack thereof) of opening an investigation into the use of force by the IDF soldiers in the maritime incident.[54]

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52 *Id.*, at 108 (there it was stated that 31 people were wounded in the incident, however this number does not correspond to the data provided to the Commission by the Israeli hospitals); see also: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 156.

53 Meeting between Hoshea Gottlieb, the Commission's coordinator, and Major–General Avichai Mandelblit, The Military Advocate–General, 4 (Aug. 10, 2011).

54 *The Government resolution to appoint the Commission*, *supra* note 1, led to a certain change in the approach of the MAG to the examination process that he had intended to undertake, due to the authority granted to the Commission to request from the head of the 'Experts Debrief' team to deepen the inquiry or to expand it. The MAG's approach was that the implications of this authority were that the 'Experts Debrief' remained pending until such time as the Commission would complete its examination with respect to the circumstances of the event and that, accordingly, the completion of the process of examining the claims raised with respect to the IDF forces in the event would take

40. In Chapter D, the Commission discussed the use of an operational debrief in situations in which a fact–finding assessment needs to be conducted, and pointed out the difficulty in relying on the operational debrief as a supporting tool for a legal decisions. The analysis of the possibility of relying on the Eiland Report – which is a professional and thorough report conducted independently from the operation's chain of command – as a tool for a fact–finding assessment of the maritime incident highlights the inherent difficulties in relying on an operational debrief. This heightens the importance of the Commission's recommendation in Chapter D to establish a fact–finding assessment team that will focus on the legal requirement to clarify the circumstances of an incident, using questions and analysis that will assist the MAG in deciding whether to open an investigation within a short period of time.

41. In the margins, the Commission considers itself obliged to discuss a serious deficiency it has found in the use of the operational debrief as a tool to support a legal decision with regard to obtaining the testimony of one of the commanders that participated in the maritime incident. As noted, section 6(c) of the Government resolution to appoint the Commission permitted the Commission to request the General Staff Experts Team which conducted the operational debrief (the Eiland Team) to deepen and expand the debriefings it had conducted. This enabled the Commission to obtain testimonies from all of the IDF soldiers who used force during the maritime incident.[55] These testimonies, which were documented in writing, were taken in the institutional framework of an operational debrief. The Commission members did not meet with the soldiers; the soldiers' names and their ranks were not provided to the Commission and they were referred to by numbers given to them in the debriefing.

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place after completion of the General Staff Experts Debrief which was being conducted under the guidance of the Commission, and in light of its conclusions. The MAG emphasized in his second position paper that this modification to the regular working methods with respect to examinations of combat events is unique and results from the special mandate given to the Commission in this context. See: *MAG Position Paper 2010, supra* note 23, at 83.

55 See above, paras. 13–15.

The Commission accorded special importance to the understanding of the command echelon during the incident, due to its special significance with respect to the issue of the change in the Rules of Engagement provided to the forces. Indeed, as indicated in the letter from Colonel Milo to the Commission, the testimonies submitted to the Commission included the testimonies of all of the commanders who took part in the operation, including the testimony of Soldier no. 21, which started with the words, '*My role was to be the commander of helicopter 2. My mission, to fast–rope with my force* onto one of the other boats'.[56]

In one of the supplementary debriefs conducted at the request of the Commission, testimony was received from Soldier no. 42, who had not testified previously. The testimony began: '[Soldier no. 42] served as *a* force commander *in* Helicopter no. 2'.[57] The testimony was written in the third person, and was very short (the entire testimony is three sentences, and one of them is a quotation from the testimony of Soldier no. 17). After being requested on several occasions to provide additional details regarding the testimony of Soldier no. 42, the military authorities notified the Commission that this soldier had been transferred to another unit and that due to operational reasons it was not possible to obtain more detailed testimony from him. Therefore, the Commission noted in its confidential annex attached to the Commission's First Report that 'for operational reasons only limited information was received' with respect to Soldier no. 42.

42. On 3 February 2011, just after the submission of the Commission's First Report, an investigative journalist, Dr. Ilana Dayan, contacted the Commission's Coordinator and reported that in conducting a media investigation a claim was brought to her attention that the commander of the force on the second helicopter was prevented from providing his

56 See: *Debrief Expansion*, *Sep. 20, 2010*, *supra* note 31, Testimony of Soldier no. 21, at 1 [emphasis added].

57 [Emphasis added].

testimony to the Turkel Commission, despite his having requested to do so. According to Dr. Dayan, to the best of her knowledge, the commander of the second helicopter was a senior officer who had transferred to another unit. The Commission thus contacted the then–assistant to the Chief of Staff, Colonel Erez Weiner, on 7 February 2011, and asked 'to receive details about the process of collecting testimonies and materials in the framework of the expansion and deepening of the debriefs, including specific details of the testimonies described above [testimonies of Soldier no. 21 and Soldier no. 42]'.[58]

43. On 31 March 2011, a response was received from the Chief of Staff's office, signed by the new assistant to the Chief of Staff, Colonel Hod Betzer (hereinafter: the Response Letter).[59] According to the Response Letter, the Chief of Staff ordered the matter to be inquired by a senior officer who does not serve in the Navy and was not involved in the maritime incident, the head of the ground forces headquarters, Brigadier–General Yoav Har–Even. The Response Letter also stated that because Brigadier–General Har–Even was not knowledgeable about the details of the operation, additional testimony of Soldier no. 42 was collected (with his consent) by the Eiland Team. The Inquiry Report prepared by Brigadier–General Har–Even and the complete testimony of Soldier no. 42 were attached to the Response Letter. It further stated that the conclusions of Brigadier–General Har–Even were presented to the Chief of Staff who accepted them.

The Inquiry Report indicates that the complaints of Soldier no. 42, an officer with the rank of major who commanded the forces that fast–roped from the second helicopter (as distinguished from Soldier no. 21, who served as the commander of *one of the two forces* on the second helicopter), are related to the fact that after giving his testimony to Colonel Rafi Milo

58 Letter from Hoshea Gottlieb, the Commission's coordinator, to Colonel Erez Weiner, Assistant to the Chief of Staff, *Process of Deepening and Expanding the Inquiries* (Feb. 7, 2011).

59 Letter from Colonel Hod Betzer, Assistant to the Chief of Staff, to Hoshea Gottlieb, the Commission's coordinator, *The Request of the Public Commission Examining the Maritime Incident of 31 May 2010 Concerning the Process of Deepening and Expanding the Inquiries* (Mar. 31, 2011).

during the Experts Debrief (Eiland Team), he was not called back to appear before the team that conducted the supplementary debriefs for the Turkel Commission, yet his first testimony was given to the Commission. Soldier no. 42 believed that he was intentionally not called to testify during the supplemental debriefs, and that no effort was made to call him. Brigadier–General Har–Even's inquiry found that Soldier no. 42's claim regarding the 'forgery of his testimony/statement' before the Turkel Commission was incorrect, and that all of his statements that were provided to the Commission, although incomplete, were based upon his statements before the Eiland Team during the original operational debrief, and that 'there were no substantive factual problems with the material submitted'.[60]

Nonetheless, in describing the actions that were undertaken in order to complete the taking of Soldier no. 42's testimony, Brigadier–General Har–Even concluded that the handling of taking the officer's testimony was extremely deficient and that he could have been called to testify by means of an explicit order.[61] Because the matter involved an officer serving in the army such that giving his testimony was not of a voluntary nature, Brigadier–General Har–Even added that 'it would be appropriate to draw lessons from this process. How is it that regarding such a material issue, in which the credibility of the operational debrief is under public scrutiny, whatever is needed to "close the chapter" is not done'.

2. The MAG's Decisions after Submission of the Turkel Commission's First Report and the Palmer Report

44. On 29 June 2011, the MAG submitted to the Turkel Commission a legal opinion of the MAG Corps for Operational Matters concerning the six incidents in which the Commission had not made a determination about the

60 *Id.*

61 Brigadier–General Har–Even stated: 'Moreover, precisely because of the sensitivity of the Turkel Commission, it does not seem reasonable to me that when questions are asked and clarifications are requested regarding the use of live fire on the vessel, they make do with an attempt to reach him by telephone, and when they don't succeed, they provide an extremely partial testimony'.

legality of the use of force. The opinion stated that 'in six of the foregoing incidents, the Navy was requested to conduct a supplementary debriefing of all parties who witnessed the events or who may have taken part in them' and that issues arising from the electronic media were analyzed by 'a senior analyst in the naval intelligence... and the intelligence officer of the unit [Shayetet 13] at the time of the events. The analysis of the material was conducted using professional video analysis systems, in the photography and video analysis laboratory of the naval intelligence department [...]'.[62] The legal opinion determined that the use of force was justified in some of the incidents examined. With respect to two incidents (which, according to the opinion, were actually one incident), it was determined that 'there is no reason to continue investigating this issue because it will not lead to results in the criminal arena'; with respect to another incident, it was determined that 'despite efforts by naval personnel... the inquiry process has been exhausted and the file should be closed without taking legal measures'.

On 4 April 2012, the MAG submitted another legal opinion to the Commission concerning two additional events referred to in the Palmer Review Panel Report. With regard to these two events the Palmer Report presented a broader evidentiary basis than the analysis presented in this context in the Turkel Commission Report.[63] After examining these incidents, the MAG decided that there is no basis for taking legal measures with respect to these incidents due to the grounds detailed therein.

45. It should be noted that the purpose of the aforementioned 'supplementary debriefing of all parties who witnessed the events or who may have taken part in them' (with regard to the six unsolved incidents) is unclear to the Commission. This is due to the fact that the Commission

62 *Examination of the Six Incidents in Light of the Commission's Conclusions*, *Jun. 29, 2011*, *supra* note 37.

63 Letter from Major Roni Katzir, MAG Corps, to Hoshea Gottlieb, the Commission's coordinator, *Analysis of Events Discussed in the Palmer Report – Decision Not To Open An Investigation* (Apr. 4, 2012).

approached the IDF on seven separate occasions, including several occasions regarding those same six matters that remained open,[64] and finally the Commission stated that it was 'unable, with the available tools'[65] – i.e., the supplementary inquiries of the Navy and the analysis of the videos by its intelligence – 'to be able to make a determination regarding [the legality of] the use of force' in those incidents.[66] Also, the MAG's decision in this matter does not specify which additional tools – other than the existence of a supplementary debriefing on the part of the Navy and use of the analytical capabilities of naval intelligence – the MAG used to reach a decision concerning these six incidents. If indeed additional tools, which are not described, were utilized, then it is appropriate to question why they were not used when the Commission repeatedly asked about this.

46. In accordance with Chapters A and D, the Commission finds it necessary to reiterate and to clarify that whenever claims and complaints are raised concerning violations of international humanitarian law, the MAG must examine whether there is a reasonable suspicion that a violation has occurred. Upon concluding this examination, he must decide whether or not to open an investigation, and only after the investigation is concluded he must decide whether to take legal action. It is emphasized that precision in the uniform and correct usage of the various terms in the recommendations presented to the MAG and in the MAG's decisions (examination, reasonable suspicion, investigation, legal actions) is important from both a substantive and procedural perspective because, *inter alia*, it enables the decision to be comprehended and reviewed.

64 See above, *supra* note 32; See also: THE COMMISSION'S FIRST REPORT, *supra* note 2, para. 9.

65 THE COMMISSION'S FIRST REPORT, *supra* note 2, at the confidential annex.

66 *Id.*, at para. 239.

SUMMARY

47. In this Chapter, the Commission discussed certain aspects of the question of whether the examination and investigation mechanism for complaints and claims concerning violations of international humanitarian law, as implemented with respect to the maritime incident, conforms to the obligations of the State of Israel under international law. In this case, one incident was analyzed – and it can be seen as a test case – with respect to the examinations and investigations conducted after the maritime incident concerning the use of force in the incident, according to the international law principles and the recommendations set out in this Report.

Although, all aspects of the incident were ultimately investigated, the Commission saw fit to point out several structural problems that demonstrate the importance of the recommendations in Chapter D. Rectifying these problems will improve the effectiveness of the IDF's investigation mechanisms. In this regard, the Commission discussed the fact that there is no civilian body that coordinates all aspects of the security force's actions from the perspective of international law. The Commission also proposed considering the adoption of a policy that requires investigations into incidents causing serious and unforeseen damage. The Commission emphasized the need for an organized system of documenting the scene of an incident by establishing, assimilating and enforcing this system in written procedures. The Commission found support for its recommendation in Chapter D that the IDF should not rely on operational debriefs in making a decision on whether to open an investigation, but rather should establish a fact–finding assessment team that will focus on the legal aspects of an incident, in cases where there is a possible suspicion of a violation of international humanitarian law. This conclusion resulted from the Commission's analysis of the MAG's possibility to rely on the Eiland Report in his decision on whether to open an investigation into the maritime incident. Finally, the Commission has highlighted the importance

of precision in the uniform and accurate use of legal terms, as determined in Chapters A and D of this Report, in the framework of decisions taken following the process of examining and investigating claims and complaints of violations of international humanitarian law.

Despite the extraordinary nature of the maritime incident, most of the problems identified in this analysis of the examination and investigation processes conducted after the maritime incident were not unique to this incident. Therefore, this Chapter is, an example of the application of the principles set out in this Report on a particular case, and it thus clarifies and emphasizes the significance of the Commission's recommendations.

Closing Remarks

This Second Report concludes the Commission's work of considering the mechanisms and methods of examining and investigating complaints and claims of violations of international humanitarian law. Together with the First Report that we submitted in January 2011, we have now completed the task that the Government of Israel entrusted to the Commission. The Commission hopes that both reports will make a contribution not merely to Israeli law and society, but to the whole community of nations that cherish the rule of law.

Justice of the Supreme Court (ret.)
Jacob Turkel, Chair

Professor Miguel Deutch, Member

General (ret.) Amos Horev, Member

Lord David Trimble, Observer

Ambassador Reuven Merhav, Member

Professor Timothy McCormack, Observer

Annexes

Annex A	**List of the witnesses that appeared before the commission and the Commission's Coordinator, and the dates of their testimonies**	468
Annex B	**The Sample Examination**	469
Annex C	**The Comparative Survey**	475
	The Questionnaire	476
	The Country Reports	
	The US report	485
	The Canadian report	563
	The Australian report	643
	The UK report	717
	The German report	801
	The Netherlands report	887

Annex A: List of the witnesses appearing before the commission and the Commission's Coordinator, their positions and the dates of their testimonies

Witness' Name	Witness' Position	Date
Mr. Yehuda Weinstein	Attorney–General	Apr. 10, 2011
Mr. Shai Nitzan	Deputy State Attorney (Special Assignments)	Apr. 10, 2011
Major–General Avichai Mandelblit	Military Advocate–General	Apr. 11, 2011
Ms. Jessica Montel	B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Director General	Apr. 11, 2011
Mr. Saker a–Tameizi, Ms. Hayfa a–Tameizi	The father and widow of Yasser a–Tameizi	Apr. 11, 2011
Mr. Michael Sfard, Adv.	Yesh Din – volunteers for human rights, Representative	Apr. 11, 2011
Ms. Limor Yehuda, Adv., Mr. Dan Yakir, Adv.	The Association for Civil Rights in Israel, Representatives	Apr. 11, 2011
Mr. Yuval Diskin	Head of the Israel Security Agency	Apr. 12, 2011
A.	Legal advisor of the Israel Security Agency	Apr. 12, 2011
Dr. Ishai Menuhin, Ms. Bana Shoughry Badarne, Adv.	Public Committee Against Torture in Israel, Representatives	Apr. 12, 2011
A.	The Mavtan (Interrogatee Complaints Comptroller in the Israel Security Agency)	Apr. 13, 2011
Ms. Rachel Matar	Former Supervisor of the Mavtan	Apr. 14, 2011
Brigadier–General Meir Ochana	Chief Military Police Commissioner	Apr. 14, 2011
Prof. Eyal Benvenisti, Prof. Yuval Shany, Dr. Amichai Cohen	International law professors	Apr. 14, 2011

Meeting with the Commission's Coordinator		
Major–General Avichai Mandelblit	Military Advocate–General	Aug. 10, 2011
Mr. Uri Carmel	Director of the Police Internal Investigation Department	Sep. 22, 2011
1. Mr. Yehoshua Lemberger 2. Commander Ayelet Elisar 3. Superintendent Slavit Michaels 4. Commander Haim Rachamim	1. Deputy State Attorney (Criminal Matters) 2. Deputy Legal Advisor of the Israel Police 3. Legal Advisor of the Israel Border Police 4. Deputy Head of the investigative branch of the Judea and Samaria District of the Israel Police.	Oct. 5, 2011
Colonel Erez Katz	Former Brigade Commander who carried out many operational debriefs	Nov. 29, 2011

Annex B: The Sample Examination

The Public Commission to Examine the Maritime Incident of 31 May 2010

16 Elul 5771
15 September 2011

Dear
Brigadier–General Danny Efroni
The Military Advocate General

Subject: **Sample Inspection of Files**

First I would like to congratulate you and wish you success in your position as Military Advocate General.

Following on from conversations held with your predecessor, Major General Avichai Mandelblit, on the subject at hand, it is requested that you present the Commission with all of the materials (operational inquiries, investigative materials, documents prepared at the MAG Corps and any other relevant material) related to the events and files detailed in the appendix attached to this letter.

You are also requested to provide the Commission with a random sample of approximately 30 files (and all their materials) dealing with the death or injury of an uninvolved civilian. These files and materials must concern events no earlier than the year 2000 and must be chosen by you according to the following categories:

1) Approximately ten events where it was decided that a CID investigation would not be launched following the operational debrief.

2) Approximately ten events where it was decided, based on a CID investigation, not to submit an indictment. In relation to these events it is requested that about half the files will be cases where the decision to launch a CID investigation was made after assessing the operational debrief and about half where the decision to launch a CID investigation was immediate.

3) Approximately ten events where it was decided, based on a CID investigation, to submit an indictment. In relation to these events it is requested that about half the files will be cases where the decision to launch a CID investigation was made after assessing the operational debrief and about half where the decision to launch a CID investigation was immediate.

We ask that the files in each category be divided between events in the Gaza Strip and events in the West Bank.

I would be grateful for the transfer of at least some of the files before 20 September 2011.

Wishing you a Happy New Year,

Hoshea Gottlieb,
The Commission's Coordinator

Appendix to the letter

Events mentioned in the Tomuschat Report

1. Death of Muhammad Hajji and shooting of Shahd Hajji and Ola Masood Arafat.
2. The Abu Halima family incident.
3. The Abd al–Dayem incident.
4. The attack of al–Quds Hospital incident.

Events mentioned in the Davis Report

5. The Samouni family incident.
6. The Al–Atatra sandpit incident.
7. The Al–Wafa Hospital incident.
8. The Ibrahim Juha incident.
9. Human shields incidents (the Davis Report points to the existence of three separate incidents where human shields were used).
10. The al Matariye family incident in Hebron.
11. The Basam Abu Rahma incident in Bil'in.
12. The Yasser Tmeizi incident in Tarqumiyah.

Incidents mentioned in the B'Tselem report – 'irresponsibility'

13. Rami Samir Naif Shna'a, 25 years old, Nablus resident, killed on 2.6.07.
14. Yasser Sakher Ismail a–Tamiizi, 30 years old, resident of Idhna in Hebron district, killed on 13.1.09 at Tarqumiyah crossing.
15. "Mistaravim" action in Ramallah on 4.1.07 – 4 killed and about 40 wounded.
16. Anam Muhammad Assad a–Tibi,52 years old, Nablus resident,

killed on 26.2.07.

17. Muhammad Halil Muhammad Salah, 35 years old, resident of Dir Salah in Bethlehem district, killed on 5.12.07 (unclear if killed by military forces or police).
18. Abbad Sacher Muhammad al–Wazir, 69 years old, Nablus resident, killed on 16.10.07.
19. Wahib Muslah Naif a–Dich, 28 years old, resident of a–Dich village in Salfit district, killed on 14.12.06.
20. Abed Al–Aziz Hamed Abed Al–Aziz Al–Matur, 28 years old, killed on 5.4.07.
21. R'azi Maher R'azia a–Zaanin, 12 years old, resident of Beit Hanoun in the Northern Gaza Strip, injured by shooting on 4.9.09 and died of his wounds the next day.

Incidents appearing in documents submitted to the Commission by 'Yesh Din'

22. Notice no. 1237/08 to the Police Investigation Unit in Be'er Sheva. Yaakov Mumhamad Tzalas ala Katzrawi, 15 years old from Hebron, shot and seriously injured.
23. CID file Sharon Samaria 210/09, Muhammad Fasil Musa Salim, 16 years old. Injured by shooting in Azzoun.

Incidents appearing in 'Exceptions' report by 'Yesh Din'

24. Files 08/08, 14/08 at Southern Military Court – beating of bound and blindfolded detainees.
25. File 497/03 at Northern Military Court – killing of 7 year old child.
26. File 186/04 at Northern Military Court, military court appeals file A/59/05 – killing of 3 year old child.
27. File 214/04 at Southern Military Court – killing.

Incidents appearing in documents submitted to the Commission by the Association for Civil Rights in Israel

28. The incident mentioned in Zaharan 6928/08 petition to the High Court of Justice.

Others

All criminal files that are in some way related to the maritime incident of 31 May 2010.

Supreme Court Justice (Ret.) Jacob Turkel, Chair

General (Ret.) Amos Horev, Member

Ambassador Reuven Merhav, Member

Professor Miguel Deutch, Member

Lord David Trimble, Observer

Brigadier General (Ret.) Kenneth Watkin, Q.C., Observer (untill Apr. 15, 2011)

Professor Timothy McCormack, Observer

Advocate Hoshea Gottlieb, Commission's Coordinator

Professor Michael Schmitt, Special Advisor (untill Sep. 25, 2011)

Professor Claus Kreß, Special Advisor

Professor Gabriella Blum, Special Advisor